National Treatment of Foreign Retention of Title Clauses in Finland – A Restriction to Internal Market Freedoms or Merely an Issue of *De Minimis* Value?

Master's Thesis
European Law
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April 2019

Tiedekunta Oikeustieteellnen tiedekunta	**Laitos**	
Tekijä Heidi Lumme		
Työn nimi National Treatment of Foreign Retention of Title Clauses in Finland – A Restriction to Internal Market Freedoms or Merely an Issue of *De Minimis* Value?		
Oppiaine Eurooppaoikeus		
Työn laji OTM-tutkielma	**Aika** 23.4.2019	**Sivumäärä** XXIII-90

Tiivistelmä

The aim of this thesis is to develop fact-based arguments on whether the European Court of Justice would regard non-recognition and non-enforcement of a foreign retention of title clause by a Finnish court as a restriction to the free movement of goods or the free movement of capital. The issue is elaborated through a fictional case method between Finland and Germany that reflects an earlier case of the ECJ, *Krantz*. In that case, the Court did not find a restriction to internal market as the issue was considered "too remote and indirect" – an expression that might hint for an implied *de minimis* threshold. Consequently, the focus is directed to whether the new developments of the Court's assessment of the free movement provisions might change the way a situation that resembles *Krantz* is seen at the current state of the EU. Is it a hindrance or even an obstacle? Or perhaps, could there be a hidden *de minimis* threshold that the "restriction" at hand merely does not meet?

The thesis begins with an introductory chapter, after which it is divided into three parts: two premises and their conclusion. The first part focuses on examining why there is a problem, whilst exploring the literature written on possible alternatives to the reason of the problem, the *lex rei sitae* rule. Hence, the approach in the second chapter is mostly of private international law. Chapters three and four form a whole and continue from what was concluded in chapter two. Here, the focus is on internal market law. After this, part two begins and the focus shifts to *de minimis* in the form of the market access test which I see as the most feasible way to include proprietary security rights, such as retention of title clauses. The findings here are that there can indeed be seen to be different *de minimis* thresholds even with regard to the internal market freedoms, regardless of the ECJ's express denial. The third part consists of chapters six and seven which aim to provide answers to the research questions and thus construe a theory on how the fictional case could we resolved by the ECJ at this stage of the EU integration.

Avainsanat
retention of title clauses – free movement of goods – free movement of capital – market access – *de minimis*

Säilytyspaikka

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LIST OF ABBREVIATIONS

AG	Advocate General of the Court of Justice of the European Union
BGB	Burgerliches Gesetzbuch (Germany 18 August 1896)
ECJ	European Court of Justice
EGBG	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany 18 August 1896)
EU	European Union
H	Højesteret (in connection with an UfR reference)
KKO	Korkein oikeus (Supreme Court in Finland)
MEE	Measure of equivalent effect
NJA	Nytt juridiskt arkiv, Lagskipning (Sweden)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UfR	Ugeskrift for Retsvaesen, Dansk domssamling (Denmark)

1. INTRODUCTION: WHEN PROPERTY LAW ENCOUNTERED EUROPEAN UNION INTERNAL MARKET LAW

1.1 Building the base: the players and the playfield

At its core, the European Union is about economy. Even before the EU was a political union, it was an economic organization based on facilitating the economic collaboration between its Member States. As important as it was for the outer border of the Community to have customs control, as crucial it was for its internal market to not have them. As a consequence, four fundamental freedoms of the internal market were invented: free movement of goods, services, persons and capital. The aim of the new internal market agenda was to facilitate the flow of these four factors in order to build a prosperous cross-border economy.

A well-functioning economy means commercial activity which, for the most part, is dependent on acquiring credit. Then again, for one economic actor to extend credit to another economic or commercial actor relies largely on security and trust; the likelihood of receiving a repayment from the debtor needs to be high. This trust, in turn, lies in the concept of security. A proprietary security right is a means to fulfil this trust and security required by those willing to extend credit: by agreeing upon an asset as an 'encumbered asset' – this asset being subject to a proprietary security right – the credit becomes 'secured credit', while the creditor receives the qualification 'secured creditor'. This way, the payment is secured in case the debtor – the party receiving the credit – defaults on payment. The purpose of a secured transaction is that in this case the creditor's claim can be satisfied by the monetary value of the encumbered asset; the debtor loses the encumbered asset but the secured claim remains secured: the creditor receives what is hers. When the purpose of a secured transaction is fulfilled and the creditor can recover the credit with the help of a certain asset agreed upon by the parties to the transaction, legal certainty is fulfilled. Trust is protected as both parties know beforehand what is at stake, what the risks are, and what will occur in case the risks actualize.[1]

[1] See Juutilainen 2015, pp. 1, 4–10.

Hence, proprietary security rights and the proprietary products and instruments being encumbered by the creditor serve numerous purposes in an economy: they operate to produce a profit, to achieve payment to the benefit of the creditor and work to hold assets and facilitate their transfer. Besides, they operate as risk management tools for the creditor.[2] A retention of title clause is a proprietary security right where the buyer retains the ownership of an object until the buyer has fulfilled his obligation to pay the purchase price in full. The retention of ownership works as a security for the seller's right to receive the purchase price for the assets. When the payment has been done, the buyer is entitled to the ownership of the object. What makes the use of retention of title problematic is that using the device allows the buyer to have the possession of the object even when he has not fulfilled his obligation to pay the purchase price.[3]

Extending credit promotes the economy in even more ways – ways which resonate with the prosperous functioning of the internal market. The ECJ has declared certain national actions as incoherent with the proper functioning of the internal market and thus prohibited. It was the current Article 34 TFEU, free movement of goods, which attracted special interest from the 1970's until the early 1990's. According to the Article, both quantitative restrictions and 'all measures having equivalent effect' (later: MEE) to them were prohibited. First, the Court laid down the basic definition of a MEE in *Dassonville*. The famous clause was as follows: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, are to be considered as measures having an effect equivalent to quantitative restrictions."[4]

1.2 To harmonize or not to harmonize, that is the question

1.3.1 *Issue number one*: The problem with *lex rei sitae*

The treatment of foreign proprietary security rights has been investigated by scholars in the context of movable property. European legislation has frequently been claimed not to offer enough protection when it comes to the problem with valid security rights created in one

[2] Dalhuisen 2016, p. 1.
[3] Drobnig – Böger 2015, pp. 241 – 242.
[4] Case 8/74 *Procureur du Roi v. Benoît and Gustave Dassonville* (1974) ECR 837, para. 5.

Member State with regard to a movable object in the situation where this object enters into another jurisdiction which, due to different rules on property law, does not recognize or enforce the security right created in the previous state. This kind of conduct has been said to wipe out the security right validly created in the first Member State or the export country merely because of divergences in substantive laws.[5] All European countries have adopted the *lex rei sitae* rule as the applicable rule to movable and immovable assets in their region. According to *lex rei sitae*, to any object which is situated within a State's borders, this State's jurisdiction applies. As far as immovable objects are concerned, use of the rule is rather unproblematic – a real estate is, by definition, something that does not change its location. [6]

On the contrary, when it comes to movable objects, the situation becomes a lot trickier as movable objects are indeed *movable* – their location can be changed from one state to another. In the property law context, applying *lex rei sitae* means that the creation of a security interest as well as the insolvency proceedings which take place, should the debtor default his obligation to pay, are governed by the law of the original member state (Member State A)[7]. Hence, the questions of what legal rights are recognized under the national legal regime and consequently, what the priority order among competing creditors is, are decided and determined under the legislation of Member State A. As can be expected, *lex rei sitae* rarely proves problematic in a purely domestic context: the substantive law, according to which the proprietary relation between the debtor and the creditor has been created, will equally apply to the enforcement of this legal relation and thus satisfy the secured creditor's claim as intended by the parties. In solely national situations, no surprises usually occur. Nevertheless, however simple a connecting factor *lex rei sitae* may appear, it bears a significant drawback: its inflexibility.[8]

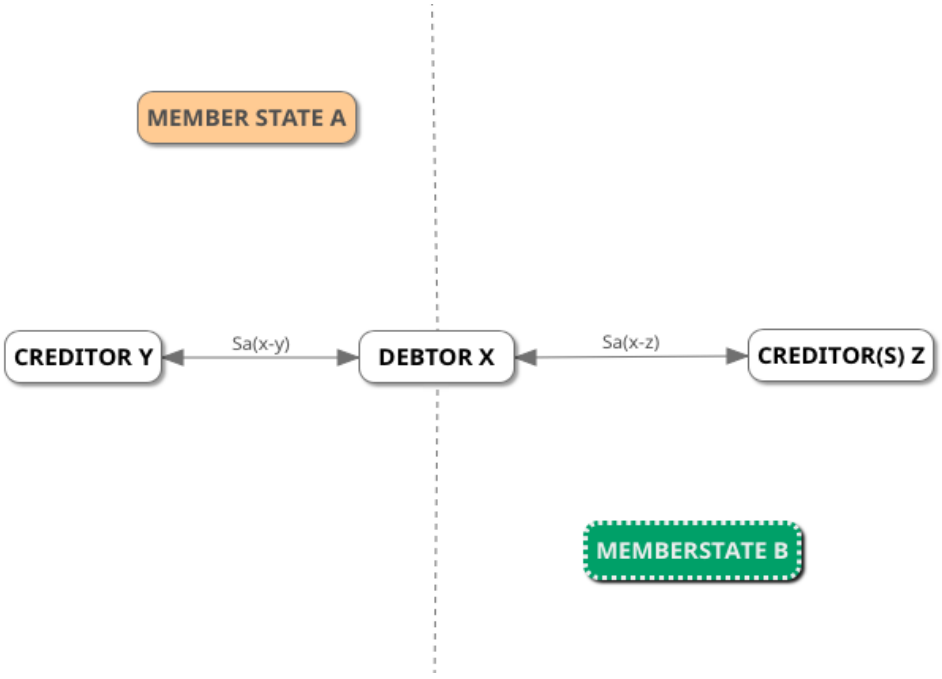
The inflexible application of *lex rei sitae* will, however, lead to two different practical problems. First, if the assets securing a loan are located in more than one Member State, application of the laws of all these jurisdictions would be needed to create the respective security right. This means a harsh burden on companies with a broad international business. Second, and even more of a

[5] See for example Roth 2008, pp. 37–39.
[6] See, for example, Akkermans – Ramaekers 2012, pp. 1–4.
[7] See table 1, page 4.
[8] See Akkermans – Ramaekers 2012, pp. 5–6.

burden is a situation where the trans-border movement of an asset causes a change in the applicable substantive law.[9]

This study focuses on the treatment of foreign proprietary security rights in the Member States of the EU and specifically the situation brought about by cross-border third-party conflicts between competing secured creditors whose habitual residences are in different Member States. These situations have been called both *conflit mobile* and *Statutenwechsel,* of which I choose to use the latter. The *Statutenwechsel* situation takes place when the statute, in other words the substantive law applicable to the legal relation, changes in a way that affects negatively the treatment of the encumbered asset. This is because the asset becomes subject to *lex rei sitae*.[10]

In this situation, two legal relations can be separated: the relation between the debtor X and the original secured creditor Y, between which the relevant security arrangement has been concluded in jurisdiction A [A:SA(x-y)], and the relation between the debtor X and his further creditors Z in jurisdiction B, between which additional competing security arrangement has been concluded [B:SA(x-z)]. The situation can be illustrated by the following charter made by myself:



[9] Juutilainen 2012, p. 110; Roth 2008, pp. 38–39.
[10] Buure-Hägglund 1978, p. 91; Juutilainen 2015, pp. 211–215.

Statutenwechsel situations are always real conflicts – in cases where no relevant differences between the competing jurisdictions existed, the situation could not qualify as *Statutenwechsel* in the first place. An explicit example of actual problems caused by the *lex rei sitae* rule is the case with a non-possessory pledge, such as retention of title: a non-possessory pledge validly created under the law of Member State A will run the risk of being wiped out when the asset is moved to Member State B in case the substantive law of B does not involve a properly equivalent security right to the original right and therefore does not recognize and enforce the encumbered asset now being governed under that law. Hence, the formerly *ultra partes* enforceable security right – a right with *erga omnes*, universal effect against the world – becomes merely effective *inter partes*, between the creditor and the debtor and no impact on third parties. Here, a connecting factor meant to promote objective legal certainty works in a reverse way by producing an outcome of unpredictability and increased risk on the secured creditor, as well as a possible loss of validly created proprietary security rights.[11]

1.1.4 *Issue number two*: The problems of private international law and the non-acting EU

If the *lex rei sitae* rule leads in as unpredictable outcomes as the ones mentioned above, why has the EU not replaced the rule with another rule or set forth a compromising instrument to allocate the negative burden that now lies solely on the foreign creditor? *Roth* accurately points out the passive conduct of the EU in the lack of feasible European legislation in this area.[12] One could ask: Why has the EU not imposed any significant legislation?

In fact, it has. The financial collateral directive[13] between financial institutions and specific set of other public and private parties has been quite successful. The directive harmonizes some aspects concerning proprietary security rights, particularly security transfer of ownership, which has generally been treated quite differently between Member States[14]. Article 6(1) of the directive sets forth that Member States have to ensure effectiveness of "title transfer financial collateral arrangements". The purpose of this provision is to protect financial collateral

[11] See for example Kieninger 1996b, pp. 47–48.
[12] Roth 2008, p. 37–38.
[13] Parliament and Council Directive 2002/47/EC on financial collateral arrangements, 6 June 2002, OJ 2002 L 168/43.
[14] See for example Commission Proposal COM(2001) 168 final, p. 3.

arrangements concerning title transfer, for example by removing the risk of re-characterizing these arrangements as security interests. Moreover, the Directive prescribes application of the law of the Member State where the relevant book entry account is maintained (Article 9). Even though this Directive does not deal with retention of title clauses, but more "professional" type of financial arrangements, it shows a good example of what kind of harmonization could be desirable also elsewhere in the field of proprietary security rights.

What is more, to impose a complete set of rules in the area of European property law may be more easily said than it is actually done. All the EU consists of is actually its Member States – and what cannot be agreed upon between them, cannot be made into legislation. Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (late payment directive) was to harmonize the third-party effects of the so called simple retention of title clauses.[15] Article 4 (3) of the Directive was meant to tackle the problem of non-recognition and non-enforcement of foreign retention of title clauses, the effect of which would have been better protection of a foreign seller-creditor in a debtor's insolvency proceedings. This is shown in the recital (13) of the draft directive, which first prescribes: "The use of retention of title clauses - - is at present constrained by a number of differences in national law", and then continues by stating that "it is necessary to ensure that creditors are in a position to exercise the retention of title throughout the Community, using a single clause recognized by all Member States.[16]"

As the draft directive prescribed, the directive would "provide for the retention of title to be enforceable against third parties, even in the case of bankruptcy of the debtor". The formal requirements in Article 4 (1) for a simple retention of title would be moderate, only requiring that the clause is to be agreed before delivery of goods and also a one-sided clause by the seller would be binding on the buyer, if he does not oppose it. All in all, the purpose was to increase foreseeability by facilitating the cross-border use of retention of title clauses – exactly what the inflexible use of the *lex rei sitae* rule sets obstacles to.

[15] Commission Amended Proposal COM(1998) 615 final.

[16] The first version of the late payment directive was Parliament and Council Directive 2000/35/EC on combating late payment in commercial transactions, 29 June 2000, OJ 2000 L 200/35. The first version was then recast with Parliament and Council Directive 2011/7/EU on combating late payment in commercial transactions, 16 February 2011, OJ 2011 L 48/1. Nevertheless, renewal of the Directive did not change the provision of retention of title.

However, the directive did not solve the problem. Due to differences of opinion about the actual wording of the Article and because it turned out unclear what the EU's legislative competence in property law was, the final form of the Article 4 became a disappointment[17]. The current formulation does not even mention third-party effects. The final wording is as follows: "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods."[18] Does the wording mean that there is no longer intention in the international level to create a common European form of retention of title clauses?

Some researchers have indeed questioned whether the Article could still have relevance with regard to third-party relations, despite the formulation. The Council had based the final non-harmonization of the Article 4 of the directive on Article 345 TFEU (then 295), according to which the Treaty "shall in no way prejudice the rules in member States governing the system of property ownership." According to *Milo*, the Article does not impose a negative obligation on the EU concerning its legislative competence in the field of property law, as almost all EU legislation deals with the use of property.[19] This argument can be supported with numerous EU legislative acts, such as the financial collateral directive. The Court has actually taken a quite narrow interpretation of this Article[20]. There are also judgments given by the ECJ which show the EU has competence, when it comes to industrial and commercial property[21].

The case *Commission v. Italy* in 2006 has, however, somewhat made *Milo*'s speculations irrelevant[22]. First, according to the Court, the only (express) conclusion to be drawn from the provision is that it has effects on the national rules providing a possibility to expressly agree a clause on reservation of ownership before delivery of goods, and it is also possible to retain the ownership to the goods until the products in question have been paid in full. The Court continued by stating that "rules concerning enforceability of retention of title clauses against third parties,

[17] Milo 2003, pp. 383–385 and 389–392.
[18] The Directive did not require legislative acts in Finland, since the Finnish legislation already corresponded the Directive. See the Finnish Governments Proposal 2001:232, p. 19.
[19] Milo 2003, p. 384.
[20] Weatherill 2006, p. 145.
[21] Milo 2003, p. 384–385. See, for example, C-350/92 *Kingdom of Spain v. Council of the European Union*, ECR 1995, I-1985.
[22] Case C-302/05 *Commission of the European Communities v. Italian Republic* (2006) ECR I-10597.

whose rights are not affected by the directive, are still exclusively governed by Member State national legal order[23]."

As a consequence, it is very unlikely that a claim about a Member State's measure violating EU law would succeed in the Court, if it is based on the Article 4 of the late payment directive. In fact, there is a case based on Article 4 of the late payment directive: *Commission v. Italian Republic.*[24]. However, the Court merely confirmed here the interpretation that Article 4 does not regulate third-party effects of a retention of title clause[25]. Nevertheless, this leaves open the possibility to research the applicability of the basic market freedoms, here being the free movement of goods and capital, since they are (possibly) applicable when there is no harmonization on the measure[26].

1.2 Research questions and delimitations

This theme as itself is not exactly new as the issue has been discussed in literature. Still, however, I dare to claim that there is an area which none of them has quite touched yet. No researcher has yet structured a comparative case scenario to test an *a priori* hypothesis against the EU free movement background. First of all, most of the previously mentioned researchers have had free movement of goods as their theoretical framework. I will, too, use this freedom, but more as a means of existing doctrinal support for extending the investigation to the Article 63 TFEU, free movement of capital. Capital may not be as straightforward a basic freedom as concrete goods and their free movement when it comes to setting a positive hypothesis and finding the right tool to test it, which sets its own challenges. Nevertheless, the context of capital is less studied and allows the research to take on a more up-to-date path. Second, the existing line of research still has not managed to give a satisfactory answer or solution to the problem at hand. If anything, this should prove the need for further research.

[23] *Commission v. Italy*, paras 29–30.
[24] Case C-302/05 *Commission of the European Communities v. Italian Republic* (2006) ECR I-10599.
[25] The judgment, paras. 29–31.
[26] See for example case C-95/14 *Unione Nazionale Industria Conciaria (UNIC) and Unione Nazionale dei Consumatori di Prodotti in Pelle, Materie Concianti, Accessori e Componenti (Uni.co.pel)* ECR I-492, para. 33.

My research question is whether the combined effect of conflict rules and substantial law would, *de facto*, result in an infringement of free movement of capital within the internal market of the EU in a situation where a foreign retention of title clause is not recognized and enforced in Finland. I will seek to answer the ultimate question: How would this cross-border problem be solved and the question of whether it constitutes a restriction to free movement of capital, be answered, should it come before the ECJ in the current state of EU law? By doing this, I will employ the market access test as a *de minimis* threshold used by the ECJ, since it appears to be the most feasible approach to include the national treatment of foreign proprietary security rights into the scope of the free movement Articles.

The context of private international law and problems caused to cross-border players due to divergent substantive laws of EU Member States might tempt one to doubt the very questions set forth in this thesis: why would cross-border creditors even mind the *Statutenwechsel* issue since, after all, they have arbitration as an option? In arbitration, the parties to a security arrangement could affect who the arbitrators will be and this way the adjudicators might also be more preferable towards what is good for this party. Furthermore, one could think choice-of-law options to considerably diminish *Statutenwechsel* problems – if the parties choose the law of the export country to govern their relationship in case the relationship for some reason exceeds over the borders, should they not end up being adjudicated by this law? After all, should economic actors not at least be aware of this option?

Indeed, another important delimitation in this thesis is that arbitral tribunals or other alternative dispute resolution methods will explicitly be excluded from the scope of study. This is because the EU is *sui generis* by nature – an exceptional and unique entity among sovereign states and international organizations and hence neither equivalent to an international organization nor a federal state. Moreover, the EU law itself only sets obligations to sovereign states, which, in turn, have given the EU the very mandate to do this by becoming member states of the EU. Against this background, only relevant courts with regard to EU law are those courts in the Member States which use public power and therefore are also eligible to refer preliminary questions to the ECJ. Arbitration, on the other hand, is only feasible in disputes between private parties and specifically in *dispositive* disputes – disputes in which the parties can by nature of the dispute reach a consensus by themselves. *Indispositive* matters, in turn, do not include this

option. They are not disputes in which the parties could reach an agreement, but require an objective "mouth of the law" as a result of the public element involved in the circumstances. In addition, the nature of property law can be described by its mandatory nature which is often referred to as a form of the state's public policy – this is where the principle of *numerus clausus*, concept of property law as a nationally closed system, becomes relevant. *Numerus clausus* will be further elaborated in the section 2.1.

The EU regulation on insolvency proceedings[27] is not applicable to my theme of research and is thus outside the scope of this thesis. *Koulu*, *Herchen*, *Virgós*, *Garcimartín* and *Juutilainen* are all of the opinion that questions on if a certain object belongs to the debtor, is not an issue of insolvency law[28]. The same applies to third-party effects of retention of title clauses[29]. *Virgós* and *Garcimartin* have argued that the question of whether a foreign retention of title is binding on third persons, such as the debtor's other creditors, is of preliminary character in relation to questions regulated in the Regulation – each Member State applies its own conflict of laws rules to this preliminary question[30]. According to *Herchen*, existence of the property rights meant in Articles 5(1) and 7(1) of the Regulation is not a question of property law, but an issue to be solved in accordance with rules of private international law[31].

Despite the applicable substantive law, the relevant conflict rules are also objective and mandatory. Like rules on property law, they are also often considered rules of public policy. When substantive law is mandatory, it is out of the reach of the parties' stipulations: they cannot decide by themselves under which conditions the agreement will be enforceable against third parties. This includes the preconditions for the arrangement to become effective, which usually manifest as publicity and specificity requirements. These active requirements and passive restrictions being laid down by law makes it legally impossible for the parties to deviate from them by stipulating otherwise. The same applies to the objective connecting factors of conflict rules: parties to a security agreement cannot deviate from them either. Instead, the applicable

[27] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[28] Koulu 2002, pp. 152–153.
[29] Juutilainen 2005, p. 42.
[30] Virgós – Garcimartín 2004, pp. 69 – 70.
[31] Herchen 2000, p. 55.

substantive law governing third-party conflicts is determined on objective grounds, such as *lex rei sitae* which, as explained above, prescribes the law of the asset's location to apply.[32]

Although some research has already been done on this theme, it has been either cautious or too optimistic and straightforward. Some scholars have all ended up considering the non-recognition and non-enforcement of foreign proprietary security rights as an infringement of either Article 34 or Article 63 TFEU. However, I see that they have reached their conclusions a bit too fast. To argument on something *a priori*, before and thus without actual empirical data, is a difficult task. Only time will show, how the ECJ will eventually resolve this issue. Until then, there is room for interpretation and analogies from existing case law as well as from a source well known for the EU: the Member State's legal doctrine[33].

However, I find that the value which elaborating this issue brings to the EU legal research is mainly theoretical in the current state of the EU integration, since the EU does not seem to be planning on harmonizing the third-party effects of retention of title clauses within the Member States in the near future regardless of its earlier good intentions. Nevertheless, this does not change my view that harmonization should ultimately be the solution, be it through piecemeal, partial or more comprehensive means.[34]

1.3 Something old, something new and a hint of fiction: the research method

As a method outline, I will combine legal comparison to the aspects of traditional legal dogmatics and a fictional case method. Legal docmatics aims to provide arguments on the *status quo* of the law through systematization, interpretation and balancing of legal sources. *De lege*

[32] Van Erp 2008, p. 11; Juutilainen 2015, p. 8–9, 193.
[33] Gless – Martin 2013, pp. 37–38.
[34] For what kind of means would be the most desirable for the harmonization development, see Juutilainen 2015. Juutilainen has divided alternative approaches to four categories, the three of which – centraliced conflicts-approach, and the local substantive approach and the local conflicts-approach – work as an antithesis for the thesis, centralized substantive approach that is the most comprehensive integration method. Juutilainen ends up proposing a so called integrated approach which aims to combine the useful and feasible parts of each approach, whilst avoiding their drawbacks. See Juutilainen 2015, pp. 35–84.

lata, which goes hand in hand with legal docmatics, provides recommendations of interpretation based on these legal sources. My findings in the following chapters will mostly be *de lege lata*.[35]

Legal comparison aims to structure a frame inside of which the researcher can as objectively as possible examine the chosen jurisdictions. It is essential to set the same frame for all jurisdictions involved.[36] The interest lies in how and to what extent the characteristics of other jurisdictions can be brought into the comparer's own legal system.[37] I have sought to do this task by elaborating the property law aspects concerning the use of retention of title in Finland and Germany and comparing them. Moreover, I have included relevant case law from Denmark and Sweden, since as other Nordic Member States of the EU, they can give valuable insight into how certain issues could be resolved in Finland. This is due to the close proximity of the selected countries' legal culture. [38] My *tertium comparationis* – the instrument against which legal systems are compared – is how these legal systems have resolved the situation of a national court encountering a foreign non-possessory security right which it does not recognize[39].

The legal comparison used in this thesis works on three levels. The first level comparison is not very systemic, but seeks to find differences and models to develop one's own legal system. This model rarely includes a deeper examination of the foreign system. The second level comparison is the closest to my fictional case method: it can be characterized as a harmonization interest that seeks for the most workable solution for a legal problem mutual to several different jurisdictions. The second level comparison requires an objective instrument, concept or question against which the jurisdictions in question are analyzed. For me, this consists of both my *tertium comparationis* and the more general research question of a possible trade barrier within the internal market of the EU when a foreign – usually German – retention of title right is not

[35] Kolehmainen 2015, pp. 2–3.
[36] Husa 2010, p. 707.
[37] Herala – Hyyryläinen 2001, p. 16.
[38] See "Ruotsi – oikeudellisia tiedonlähteitä".
[39] See Hautamäki 2003, p. 109.

recognized. [40] One of my catalysators to use legal comparison is the dynamic nature of EU law – it is not only Finland, but also the EU itself that takes inspiration from its Member States.[41]

A complete, all-covering research on the topic of proprietary security rights and free movement of capital would be impossible to handle in the a master's thesis. To make this study as feasible as possible, I will realize it through a fictional case. This hypothetical scenario will be carried through this thesis as a concrete mirror for theories and already existing cases of both the ECJ and selected national courts. Finally, this case will be solved as it could be solved, should it come before the ECJ in the current state of EU law. By this, I will seek to set a specific factual-legal framework for my thesis. The case, *"Y GmbH against Finland*" is as follows:

> Y GmbH is a German sawmill company whose main business is to manufacture log handling machines required in the sawmill industry as well as sell and deliver them for recognized retailers in the Eastern Europe and the Nordic countries. *Y GmbH* has entered into an agreement SA (x-y)[42] with a Finnish retailer *X Oy* on selling and delivering a sophisticated log handling machine to Finland. The parties have also agreed that the delivery would include other machines that *X Oy* has bought (and paid) from another German company, but which are yet to be delivered to Finland. As is a common practice among *Y GmbH* and its competitors throughout Central Europe, the agreement includes a retention of title clause, according to which *Y GmbH* shall reserve himself ownership of the product until he has received full payment of the purchase price from *X Oy*, but X Oy is nevertheless entitled to re-sell the item once he has acquired the possession of it[43]. The clause is created under German law. The parties have agreed that the purchase price will be paid after the machines have been delivered. Later on, *X Oy* sells the items further to its Finnish retailers, but with a Finnish retention of title clause.
>
> However, soon after this and before the newly sold items have been delivered further, Finnish Tax Authorities seize all the delivered objects, including the machines with a retention of title clause. *X Oy* has been declared insolvent, in which situation his debts can be seized from his property. Here, the Tax

[40] This thesis includes some elements of the so called third level legal comparison in which the researcher seeks for differences in a certain legal field, such as property law. Here, the objective is often normative and close to legal dogmatic. However, the second and third level are like different sides of the same method – one is almost impossible to separate from the other. See Husa 2010, pp. 715–716.

[41] This is conducted through systematic and teleological interpretation of EU law. See Streinz 2014, pp. 161 – 163; Weatherill 2006, pp. 144 – 149.

[42] A security agreement between Y GmbH and X Oy; even though the agreement deals with a sale, it is construed through a retention of title clause, which can be seen as and which I indeed consider, a non-possessory *pledge*. This complies with a modern view of property law as opposed to the traditional view, in which a security ownership was considered fragmented and met with suspicion. See van Erp 2008, p. 21.

[43] This is a so called extended retention of title clause (v*erlängerter Eigentumsvorbehalt*). See chapter 2.2.2.

> Authorities have a priority against private debts. *Y GmbH* objects to the seizure as, due to the clause, the machine belongs to him.
>
> At this point, *X Oy* has still not paid the purchase price to *Y GmbH*. *Y GmbH* sues *X Oy* in a Finnish District Court, arguing that his rights have been breached. Because of the lex rei sitae rule, Finnish law applies. The District Court rules the case in favor of *X Oy*. This is because it has not recognized the retention of title clause in question as valid and binding even after it transformed the foreign retention of title clause into a Finnish equivalent. The case is later brought before the European Court of Justice in a preliminary ruling procedure. *Y GmbH* argues that the seizure by Finnish authorities and the non-recognition of the German right violates the free movement of goods and capital stated in the TFEU.

This case is fictional. However, it contains some key elements similar to both a Finnish Supreme Court case KKO 1990:104 (see Chapter 2), Swedish Supreme Court case NJA 1978 p. 593 and case *Krantz* (C-69/88; see Chapter 3), which can be seen as the only case of the Court that deals with movable property and free movement, even though *Krantz* dealt with Germany and the Netherlands. However, the Court somewhat still left the question of whether this violation of the buyer's rights constituted an obstacle to free movement of goods (Article 34 THEU) unanswered. Consequently, I will seek to mirror a case close to *Krantz* against the more recent developments of European law, particularly *market access* test. Could it be that in other circumstances, with more academic discussion supporting it and with actually examining the subject rather than merely dismissing it, a similar enough situation could actually be that pioneering case the Court is yet to decide?

A fictional case method is a new approach to legal research on EU law[44]. It contains elements from more traditional case analyses where an already existing case is interpreted – a method widely used in European legal research. This is well-reasoned against the background that EU law is largely developed through case law, which gives EU law its dynamic character: new interpretations modifying how the existing legislation is to be seen and applied are born from factual scenarios with EU law connections. In a way, employing cases as a part of one's methodology can therefore be seen to embrace the core nature of what EU law is. I find that the fictional case method is the best way to make use of this potential particularly with a topic that

[44] The method has been more in use in the Unites States (see for example Burnham 1987) and in the United Kingdom (see for example Hodgson 1995), where common law legal culture gives more weight on case law. However, it has also been used by European legal writers – see, for example,Yates 1975 for French perspective on international law and Smet 2013 on the case law of the European Court of Human Rights.

elaborates on how an issue with connections to three fields of law – EU law, private international law and property law – *could* be resolved by the ECJ. [45]

It is to be noted that the interest of knowledge of this thesis is mostly theoretical in that it focuses on the obvious gap in the harmonization of private law. The case is exceptional and does not reflect what I see would be the usual relation with non-possessory security rights and the free movement Articles. Most relevant proprietary security rights are either used in connection with sophisticated financial intermediaries, are in the scope of *lex registrationis* or simply belong to the area of contract law, in which case there is no mandatorily applicable numerus clausus regime of the host State or unexpected loss of rights due to *Statutenwechsel*.[46]

Even though there is no directly applicable case law of the ECJ and some scholars only consider this issue a theoretical possibility[47], I have the following argument: *There are valid grounds to consider that non-recognition and non-enforcement of rights derived from foreign retention of title clause in another Member State can constitute a trade barrier either in meaning of Article 34 or 63 TFEU*. In short, my hypothesis is that the free movement of capital could *de facto* be under an infringement, in factual circumstances similar to my hypothetical facts. This claim, which will be tested is mainly supported by the combined effect of arguments presented in European legal literature, the opinion of AG *Darmon* in case *Krantz* and the dynamic development of EU law, which constitute the valid reasons mentioned above.[48]

However, I assume that *this infringement would not be of the severity required by the ECJ in its case law to actually reach the considerably high threshold of a trade barrier described in either Article 34 or 63 TFEU*. In other words, I expect that existence of a limitation to cross-border trade would be present, but it would not be of the severity required for it to actually constitute a breach of the Treaty. First, the following prerequisites need to be accepted:

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[45] Actually, there is hardly a "European" legal method in EU scholarship, at least so far. Without an exclusive EU method, all research more or less reflects the writer's national idea of legal methodology. However, a way to make one's method more "European" in a doctrinal study has been to use the methods of the ECJ in their writing. Van Gestel and Micklitz have nevertheless criticized this approach, since it easily makes a scholar part of a herd that is blind for criticism of the Court. In a way, my fictional case method seeks to answer the writers' inquiry for a fresher, more independent way of doing European legal research. See van Gestel – Micklitz 2014, pp. 297, 299, 307, 314.
[46] See for example Dalhuisen 2016, pp. 183–315, where Dalhuisen goes through modern financial products, such as floating charges, receivable financing, finance lease and futures.
[47] Juutilainen 2005, p. 71.
[48] See Svinhufvud 2015, p. 130–133. The term *a priori* refers to purely rational conclusions. Since the ECJ is yet to give an applicable ruling of my research question, the direction of this thesis is essentially theoretical.

1. The academic doctrine on the *Statutenwechsel* problem in connection with foreign security rights entering another Member State, which has been applied to free movement of goods, can be seen to apply equally to free movement of capital, i.e. Article 63 TFEU;
2. As an implied threshold woven in the *market access* test, a *de minimis* threshold exists with regard to retention of title clauses' access to the receiving Member State's market.

1.4 Structure of the thesis

A classical way to structure an accurate conclusion is to follow the model of a logical syllogism, a form of deductive argumentation where the conclusion necessarily follows from certain premises as prerequisites for the conclusion to be logically true. A typical example is as follows: If A is B and B is C, then A is C. The facts which form the second premise can be at least legally interpreted to actualize the deed described in the legal rule, or for example fulfil the requirements stated in the rule. Sometimes the relevant legal rule is in a written form, as is the usual case in civil law countries and in the EU, but it may also be a preliminary ruling, to which the factual situation at hand is compared. When the relevant legal rule, the first premise, is a preliminary ruling, its facts are of most importance – if the facts are similar to the facts in the leading case, the legal rule in the preliminary ruling called *ratio decidendi*[49] applies. The more different the facts in the present case are to the facts in the preliminary ruling, the more difficult it is for a correlation to take place and the preliminary ruling to apply to the present case.[50]

I have chosen to divide my thesis into three parts to fit into the model of logical syllogism. Hence, part I and II will, in a way, work as premises 1 and 2, from which the conclusion, part III, will logically follow. Part I will test the first theory. It will deal with the pre-research

[49] Szabados 2015, p. 125.

[50] Deductive logic is the most prominent form of justification by inference, which means justification of something that has, in away, already been accepted. In deductive reasoning, the conclusion is implicitly visible in the premises themselves. However, this thesis will substantially deal with justification by *argument* which is substantially the same, but with a focus on the substance – this form of justification aims to achieve a certain conclusion based on arguments presented before (Kloosterhuis 2013, p. 71 and Sieckmann 2013, pp. 196–197). This makes sense, since legal reasoning is not a mathematical task, but requires balancing of interests and interpretation of existing law, the use of "creative intuity" (Novak 2013, p. 156). The distinction between deductive argumentation and more difficult, constructive and creative argumentation becomes clear when a case is a so called hard case. Here, chosen argumentation – and not the already existing premises – determines the legal consequences of a decision. See Hage 2013, p. 126.

question of which doctrine of EU internal market law should be followed with regard to proprietary security rights. Is it the free movement of goods and Keck or *market access* doctrine, these two combined or perhaps something else? This investigation will be compulsory in order to give a conclusion that is at least to some extent satisfactory, but it will set its own challenges as the tests and doctrines applied to one freedom by the ECJ will not automatically be equally applicable to the others. The first part will thus work as an ontological prerequisite for the second part, seeking to find whether this kind of threshold could, in the first place, *exist* within the defined area of research. After the first part, the second question can be asked. What follows in the part II, is the focus on *de minimis* and its concrete application: could *market access* test have a certain threshold or thresholds, some kind of *de minimis* border, so that *prima facie* prohibited national measures would nevertheless be allowed? Here, *market access* test and the possibility of expanding the application of *de minimis* rule from competition law to free movement law will be investigated.

However, this investigation will be limited to the context of European cross-border secured credit with regard to movable objects. If the test is seen to have this kind of *de minimis* threshold, do the restrictions on free movement caused by the national treatment of foreign proprietary security rights, however, fall under this threshold? If this is true, these national measures would not constitute a hindrance to internal trade, at least according to the ECJ. Was this the case, the measures would not substantially restrict marketing practices within the union. Then again, in case the answer was negative so that the effects these national measures had on internal trade did not fall under the *de minimis* threshold, these national measures would be interpreted to *actually hinder* trade in the internal market of the EU. The final part will be the conclusion and will seek to *define the threshold* with regard to my fictional case.

One of my aims in this thesis is to structure a case scenario and thus be able to answer certain substantive legal questions. In a way, the decision to divide this study into three parts will seek to fit together with this previously mentioned aim: to structure a legal ruling classically involves two premises and a conclusion brought about by the premises. At its core, this is also what my thesis is about: to construe a theory on how the ECJ *might* resolve this issue – when the Court ultimately delivers a ruling, it will follow the deductive model of a logical syllogism.[51]

[51] Novak 2013, p. 158, Bobek 2015, pp. 169–172; Sieckmann 2013, pp. 189–190, 195–199.

PART I

"It cannot be denied any longer, but has, on the contrary, been plainly confirmed now, that divergences in the property law on contractual security rights in movables are, indeed, an obstacle to the proper functioning of the internal market in the European Union."[52]

2. PRELIMINARY ISSUES: QUESTIONING THE ASSESSMENT OF THE EXISTENCE OF A FREE MOVEMENT BREACH

2.1 *Numerus clausus* as the access test to national property law

2.1.1 The situation of "*Y GmbH vs. Finland*" as a starting point

As is evident in my fictional case, the legal regime in Finland, treats the proprietary security right at hand, a more advanced type of retention of title clause from Germany in a more unfavorable way than national retention of title clauses and other proprietary security rights which have the same aim and purpose. In the case, the substantial legislation of Finland treats products, here being retention of title clauses of foreign and national origin in a formally equal way. Hence, the discrimination, which Y GmbH claims is taking place, cannot be direct.

However, the claimant Y GmbH states, the national treatment applied by Finland to the established retention of title clause, hinders the imported product, the foreign security right, purposefully accessing the market of Finland. This hindrance is brought about by Finland not recognizing and enforcing the security right created under the laws of Germany; the legal form given to the right by the national court does not correspond the substance of the transaction and the parties' purposes when establishing the right.

In "*Y GmbH against Finland*", Finland intends to transpose the security right into a better known and recognized security right. Nevertheless, this does not help the claimant's case: it only leads to an unfavorable outcome to the claimant as transposition is not complete. The

[52] Drognig – Snijders – Zippro 2006, p. 12.

numerus clausus of Finland simply does not offer adequate means to reconstruct the security right at hand as it does not know an extended retention of title clause unlike the German law. According to a strict property law system, such as the Netherlands and Finland, the manufacturer of a new product is considered the owner of this product. The same applies to situations where the original buyer is entitled to re-sell the product to his own retailers or customers. The conclusion is that the German seller *Y GmbH* loses his right to the product.[53]

2.1.2 *Numerus clausus*: the access test to national property law

Verstijlen has argued that there are three ways to divide the diverging legal systems in the EU. The first divide is between jurisdictions which recognize a specific closed list of property rights, the principle of *numerus clausus*, and jurisdictions which do not.[54] Property law rules can be considered to constitute a set of mandatory rules (*ordre public*). A legal relation cannot receive the effects of a property law relation in a certain jurisdiction if it does not fulfil the requirements of the specified *numerus clausus* system in that legal regime. The *numerus clausus* regime of a state offers private parties a set of property rights from which to choose from. The parties must however make this decision in accordance with the mandatory rules of national property law.[55]

Numeral clausus works to restrict the amount of possible encumbrances and burdens which could hinder its free transferability. It can be described as an access test to the domestic property law regime. It divides the boundaries between the rights that belong to property law, which is part of national public policy, and to those that only belong to the law of obligations which, instead, does not have public elements.[56] One of the reasons behind the principle is protection of third parties, to whom recognizing new property rights would cause unacceptable information

[53] Ramaekers 2013, pp. 6–8. According to the respondent in the case, the claimant – Y GmbH – simply should have opted for another form (and content) when establishing the proprietary security right so that it would fit better into other jurisdictions and avoid problems of recognizing it as merely a contractual type of sale. After all, the claimant should have known that as a movable object, the encumbered assets might change their location over the course of time and hence, insolvency proceedings might take place somewhere else than within the original jurisdiction. Hence, the claimant should have relied on a more predictable form of security than retention of title clause.

[54] Verstijlen 2006, pp. 18–19.

[55] Akkermans – Ramaekers 2012, p. 4.

[56] Akkermans 2008, p. 490.

costs.[57] It is significant that even with the same aim, the list is different within the Member States of the EU. For example, German law accepts a much wider catalogue of rights than the Nordic systems.[58] EU law can also be seen to form its own *numerus clausus*.[59]

It is significant here that retention of title and other ownership-based security rights are not classified in all Member States as security rights. Instead, some jurisdictions categorize them as functional equivalents of pledges or as quasi-security rights. Nevertheless, the European discussion has generally seen them as security rights, since their functions and economic objectives are similar to the so called genuine forms of pledge.[60]

2.1.3 Principle of *ordre public* – What is it and why is it relevant here?

Ordre public is a principle that refers to the use of public policy by a national court. It can be described as a principle of absolution[61]. When applying this principle, a national court rejects application of the law of the jurisdiction which should be applied according to the rules of private international law, i.e. *lex causae*. In general, it is only acceptable to rely on *ordre public* when application of a foreign law would collide with the fundamental values of the jurisdiction in which the case is being settled, i.e. *forum domicilii*. After application of the *ordre public* principle, a national court usually applies its own law, *lex fori*. However, it is exceptional to use *ordre public*, and thus, the court must always give a proper reasoning for its decision to use it.[62]

Ordre public, or public policy, is applicable even when there is no actual provision of written law. *Ordre public* is very similar to the concept of mandatory rules that are to be applied directly no matter what rules would otherwise become applicable as *lex causae*. Mandatory rules are to be interpreted strictly. This means that only a provision, the objectives of which require it to be applied also to cross-border situations. For example, for a Finnish court, mandatory rules include restrictions on import and export, public order and safety as well as provisions on competition

[57] Akkermans 2008, pp. 445–446, 555.
[58] Akkermans 2008, pp. 482–487.
[59] Akkermans 2008, p. 553.
[60] Juutilainen 2010, p. 15.
[61] Koulu 2005, p. 53; Koulu uses a Finnish word "ehdottomuusperiaate".
[62] Koulu 2005, pp. 53–54.

law. Naturally, rules of the EU competition law are also relevant here.[63] Of these sets of mandatory rules, rules relating to EU free movement law – rules of restrictions on imports and exports – and EU competition law are the most relevant for this thesis, which I will revert to later on. Concepts of *ordre public* however differ from one another in the way that *ordre public* relates more to the ethical principles valuable to that jurisdiction, whereas mandatory rules have more to do with public interest, such as fiscal, social and political objectives.[64]

Ordre public has traditionally been regarded as the final means, ultima ratio, for the national court. The court settling a case cannot rely on *ordre public* in an arbitrary manner. It is a right, not an obligation. When a national court is considering whether to apply the *ordre public* principle, it needs to assess it solely based on the (fictional) outcome of applying the foreign rule or, as in my hypothetical case, recognizing the foreign proprietary security right as itself. The court has to arrive at a fictional, substantial outcome and then compare it to the outcome it would have arrived at based on *lex fori*. What this means is that the court cannot discriminate a foreign institute, rule or legal entity merely because it considers it unfair, unjust or unethical for its national jurisdiction.[65]

Consequently, when the national court considers that the dispute at hand contains elements relating to its public policy, it can, at least theoretically, apply the principle of *ordre public* and not apply a foreign law, but its own. In Finland, situations to apply *ordre public* have usually been divided into those in which the foreign entity is against fundamental human rights, where it infringes the procedural principles that support the material outcome, where the material objectives of Finnish jurisdiction are in jeopardy and the situations in which the application of foreign law could be in breach with principles of European law. However, the national court can embrace the principle of *ordre public* only if application of the foreign legal entity is in breach with EU free movement law, such as Articles 34 and 63 TFEU.[66]

For the measure to be justifiable in accordance with Article 36 TFEU, one of the grounds stated in the Article must be present – and one of these grounds happens to be public policy.[67] It is to

[63] Koulu 2005, p. 27 and 30.
[64] Koulu 2005, p. 102.
[65] Koulu 2005, pp. 105–106.
[66] Koulu 2005, p. 106. However, this is kind of the opposite of the situation focused on in this thesis.
[67] See for example Leeuwen 2017, pp. 254–257. Public policy is a significant ground for justification in situations, where the national legislations differ across Europe due to lack of harmonization. For example, case C-470/11 *SIA*

be noted that national rules of property law constitute a set of mandatory rules. According to *Akkermans* and *Ramaekers*, it follows from national property law rules being of mandatory character that these property rules are, in fact, rules that belong to public policy, *ordre public*.[68] *Roth* has taken the same approach[69]. If this presumption is taken seriously, it may have quite significant consequences. As it is, even if a national measure falls within the scope of either Article 34 or 63 TFEU, there is Articles 36 and 65 TFEU which may justify the measure. National public policy protects values, such as transparency of security transactions, registration requirements and confidence of third parties, which may qualify as justifiable grounds. The same applies with provisions on priority order among competing creditors, which is closely connected with the economic order of a member State.[70]

Before questions of justifying the national measure – which, as itself, already includes the notion that this kind of measure actually *can* constitute a measure of equivalent effect to quantitative restrictions in accordance with Article 34 TFEU[71] – certain preliminary questions need to be investigated with regard to how the host state actually treats the foreign right.

2.2 Retention of title and its effects against third parties– legal classification and extent in chosen jurisdictions

2.2.1 On the nature of property law in private international law

As has been stated previously, the provisions of substantive law regarding retention of title and its nature as a security instrument diverge remarkably across the EU. Whereas in some Member States, a fiduciary transfer of movable property is given *ultra partes* effect towards third persons even when a transfer of possession does not take place simultaneously, this is not the case in all Member States. What is clear is that every EU Member State does recognize a reservation of

Garkalns v. Rigas dome (2012) demonstrated the national court's broad discretion to refuse authorization to open a gambling place, such as a casino, based on moral values respected in that country. The freedoms to provide services was overrun by the public policy justification that was not unproportionate.

[68] Akkermans – Ramaekers 2012, p. 4.

[69] Roth 2008, p. 52.

[70] Roth 2008, p. 52–53.

[71] This theme of EU internal market logic will be discussed in more detail in Chapter 3.

ownership as an *inter partes* valid arrangement; in other words, between the contractual parties themselves. However, the validity vis-á-vis third parties remains a problem.[72]

As Roth points out, the burden which this diversity poses may appear in two different ways. First, the creation of a security right is governed by the law of the situs. In case there were multiple assets being encumbered across the EU, executing the transaction would require application of all local laws of the Member States the assets are located. Naturally, this would be a considerable burden. However, a problem of this kind is easier to solve in relationship *inter partes* as the parties could simply use their contractual power to determine the applicable law with regard to creation of a security right.[73]

In property law, the distinction between *inter partes* and *ultra partes* effects is a remarkable one. The second problem, *Statutenwechsel*, is indeed the issue worth concern. Generally, a property right validly created under the laws of Member State A will be recognized as itself in Member State B, by making a reference to the (original) law of the Member State A. Nevertheless, when it comes to a non-possessory pledge, such as a retention of title, it is not recognized in the substantial legislation of all Member States as having *ultra partes* effects. When this is the case, a validly created non-possessory pledge may be extinguished when it is transferred to the host Member State B. In other words, an *ultra partes* effective, complete security right may become merely *inter partes* effective when it is moved to another Member State whose property law *numerus clausus* differs in this aspect.[74]

One could propose a choice of law clause as an alternative to diminish this problem. However, since *lex rei sitae* is a mandatory rule of private international law in the Member States, option to choose *lex causae*, the substantial applicable law[75], is limited to only a couple of cases, such as *res in transitu* situations[76]. Therefore the problem posed by the use of *lex rei sitae*, which is

[72] Roth 2008, pp. 37–38.
[73] Roth 2008, pp. 38–39.
[74] Roth 2008, p. 39.
[75] *Lex causae* can be the same as *lex fo*ri, which means the national law applied of the court. In most cases, *lex fo*ri determines that the dispute will be settled according to the national substantial law. Even though *lex causae* can be from another jurisdiction than where the dispute is being settled, the court must always apply its own procedural rules in settling the case. Liukkunen 2012, p. 1. See also Koulu 2005, pp. 24–25.
[76] *Res in transitu* refers to situation, where the object is only being transferred from a Member State A to Member State B, and something significant in a *lex rei sitae* -wise takes place in a country, where the object was solely in transit. It has been seen that the principle of import country law applies to most *res in transit*u situations. Instead,

at the same time foreseeable and unforeseeable, remains actual in spite of the parties' will. The substantial law of the host Member State will actually cover three issues. First, the law of Member State B will determine the legal standing of the security – whether it is considered an actual right of pledge or merely a contractual right *inter partes*. Second, it will dictate the relationships vis-á-vis third persons, i.e. effects *ultra partes*. Third, the local applicable law will solve questions on priority order among competing creditors, so to speak the principle of priority in the debtor's insolvency.[77]

2.2.2 *Numerus clausus*: Germany

German law values maintenance of legal relationships. Even though it follows the *lex rei sitae* rule, it is generally willing to use transposition on a foreign security rights, except in situations in which the right is completely unknown in Germany[78]. If, however, the right closely resembles a German functionally equivalent right, it can be transposed into it. Due to the appreciation of the principle of publicity, which aims to protect *bona fide* third parties from unknown foreign rights, public policy works as a restraint – an entrance test – in relation to foreign fancies.[79]

Germany does not follow a strict closed list of property rights. The purpose of German legislation was to facilitate the economy and this was done by enabling encumbrance of the maximum amount of objects. The parties to a proprietary transaction are considerably limited to use their autonomy, but they are bound to choose one of the available forms of security rights[80]. Parties must also follow the content given to those rights in the law. If parties try to give a right a content that the law does not prescribe, the right is not a property right, but something else, such as a mere contractual obligation with no effects against third parties.[81]

In Germany, the right of ownership can be used as security to secure fulfillment of the parties' obligations. Reservation of title devices, which make use of the ownership to the asset as a

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the law of the country, where the object was in transit, is not applicable. Buure-Hägglund 1978, pp. 226–239; Juutilainen 2005, p. 99–101.

[77] Roth 2008, pp. 39–40.

[78] This is stated in Article 43 (2) of EGBGB: "Gelangt eine Sache, an der Rechte begründet sind, in einem anderen Staat, so können diese Rechte nicht im Widerspruch zu der Rechtsordnung dieses Staates ausgeübt werden."

[79] Akkermans – Ramaekers 2012, p. 12.

[80] Van Erp 2008, p. 18.

[81] Akkermans 2008, p. 245–249.

security itself, have an important role in German property law and practice. When using these devices, the transferee, to which the object has been transferred to by the transferor, does not acquire a "real", normal right of ownership together with possession of the object, but a mere security ownership, an ownership for security purposes. Due to this, even though the object may be in possession of the transferee, the transferee does not acquire the right of ownership until he has fulfilled his contractual obligations with regard to the transferor. Hence, if the transferee does not fulfill his obligations, such as pay the purchase price of the object, the object has to be returned to the transferor, the original owner.[82]

German law recognizes several different retention of title clauses that all have different legal effects. A so called simple retention of title clause (*einfache Eigentumsvorbehalt*) is used when the object is sold to the buyer's own use. The clause is valid and in force as long as the object remains in the buyer's possession in unchangeable form. A so called elongated retention of title clause (*verlängerter Eigentumsvorbehalt*) is applicable when the buyer is entitled to sell the product further to a third person or use it in manufacturing process already during the loan period. In this situation, the retention of title concerns the claim from the third person or the new product that is being made. These clauses can be divided into two groups, manufacturing clauses (*Verarbeitungsklausel*) and proceeds clauses (*Vorausabtretungsklausel*). In both of these types, the seller/creditor can satisfy his claim from a surrogate property, either from the objects having been manufactured from the original object, or from the claims having been born due to the original buyer/debtor's sale to further clients and retailers.[83] Manufacturing clauses are allowed in Germany and thus, valid and binding vis-à-vis third parties – unlike in Finland (see Chapter 2.2.3.1, second and fifth condition)[84]. Proceeds clauses are also significant in Germany. They give the seller a priority status in the buyer's possible insolvency.[85]

Third version of retention of title clauses is a so called residual clause (*nachträglicher Eigentumsvorbehalt*). Here, the buyer sells the product to a third person with a retention of title, without the third person knowing that his acquisition is encumbered by a retention of title of the original seller. The clause is fulfilled when the original seller/creditor has received repayment

[82] Akkermans 2008, p. 187.
[83] Dalhuisen 2016, p. 97; Håstad 2001, p. 69; Juutilainen 2005, p. 33.
[84] Rutgers 1999, p. 68.
[85] Milo 2003, p. 388; Juutilainen 2005, p. 34; Håstad 2006, p. 41.

either in form of payment from the original buyer/debtor or the third person (latter buyer). According to German law, retention of title is a form of pledge that also exceeds to the surrogate property of the original product, such as claim.[86]

There are also so called all-debts clauses, extended retention of title clauses available in German law (*Kontokorrentvorbehalt* or *Konzernvorbehalt*). These clauses work as pledge for all the seller's claims which have been born in the business relationship between the seller and the buyer, or alternatively secure not only the claims of the seller but also the claims of all companies belonging to the same group as the seller. Clauses of this kind are not binding on third persons in Finland.[87]

As a conclusion, a retention of title clause is binding on the buyer/debtor and even his creditors in Germany, even if the buyer is entitled to sell the product further during the loan period.[88] All clauses which are more advanced than simple retention of title clauses, are not binding in Finland. This is because, as will be described next, Finnish law sets quite a few requirements for a valid retention of title clause. As *Håstad* has put it, Scandinavian countries share the most restrictive view, when it comes to retention of title clauses: the security right to a movable object cannot exist, if the buyer the buyer has the right to dispose of the goods before payment.[89]

2.2.3 *Numerus clausus*: Finland

It is has been discussed in literature whether Finnish property law system constitutes a *numerus clausus*. According to *Kuusinen*, there is no closed list of property rights in Finland. However, *numerus clausus* has relevance in the principle of *tyyppipakkoperiaate* in Finnish law, so the numerus clausus can be seen to apply as a principle, not a rule. The Finnish property rights can be divided into three categories: ownership, pledge and usufruct rights.[90] Retention of title clauses belong to the second category.

[86] Tepora 1992, p. 352–353.
[87] Rutgers 1999, 46–47.
[88] Tepora 1992, p. 354–355.
[89] Håstad 2006, p. 41.
[90] Kuusinen 2011, p. 314.

Finnish law recognizes retention of title clauses, but only in their simple form. The ownership of an asset is agreed to remain on the seller until the buyer has fulfilled certain preconditions. Usually, a retention of title is agreed on as a security for the seller's purchase price receivable. The normative basis for a retention of title is found in Finnish Sale of Goods Act (355/1987), Section 54:4 and Consumer Protection Act (38/1978), Section 5:27.3. According to them, "If the goods have been handed over to the buyer, the seller may declare the contract avoided only if he has reserved himself such right in the contract or if the buyer rejects the goods." When a retention of title clause is effective against third persons, it works much the same way as a typical security. In short, there are five preconditions for a retention of title clause to be valid and effective against third parties:

1. The clause has to be agreed on clearly and expressly.[91] This condition is not required in German law. In Germany, it is possible to agree on a retention of title clause as sile (*stillschweigende Vereinbarung des Eigentumsvorbehalts*): a clause can become part of the contract due to a business practice.[92]

2. The clause has to be agreed on before the buyer takes possession of the asset. This is stated in the Finnish Bankruptcy Act, Section 7.[93] According to the Act, in case the debtor is entitled to assign the assets to a third party regardless of the retention of title clause, to attach them to other assets or "otherwise dispose of the assets as if the debtor were the owner, the term shall likewise be of no effect as against the bankruptcy estate".

3. The clause needs to be directed at an individualized object.[94]

4. The clause can only be used as a security for the seller's purchase price receivables and other receivables due to the seller's acts concerning the asset.[95]

5. The encumbered asset is meant to remain and it will also in practice remain on the buyer's possession as an individual object. The clause is not valid and effective towards third parties if

[91] KKO 1994:113.
[92] However, it is questionable whether retention of title clauses can be seen as business practice in any field. Claims of such practice are being approached with a slight rejection. See Juutilainen 2005, pp. 31–32.
[93] The Finnish Bankruptcy Act, Section 7 prescribes the following: "If the term concerning the retention of title or repossession has been agreed on after the debtor has taken possession of the assets on the basis of the assignment, the term shall be of no effect as against the bankruptcy estate." See also KKO 1993:45.
[94] Juutilainen 2005, p. 28; Tepora 1984, p. 221.
[95] KKO 1977 I 1.

the buyer is still entitled to assign the object further, use it, attach it to another object or otherwise dispose of it as if the buyer/debtor were the owner. According to the Government's Proposal of the Bankruptcy Act, a retention of title clause is not effective against third persons if the buyer is, according to the contract, entitled to, without the assignor's consent, attach the asset to another asset so that a component relationship is born between the assets. The following cases decided by the Finnish Supreme Court have concerned retention of title clauses and their validity.[96]

It is to be noted that a retention of title is a feasible form of pledge in Finland, when the product, such as a machine, is being acquired as an investment acquisition and becomes part of the buyer's own usage. Then again, the Finnish system does not suit so well for usage as part of the buyer's trading assets, particularly in cross-border trade. For the Finnish system to move closer to the German model, which allows for more flexible types of retention of title clauses and considers them binding, a lot should change in the Finnish legal culture. I agree with *Tepora* that, in this case, the registration of a retention of title should become both possible and obligatory.[97] Then it would be possible to prevent situations, where change of the *situs* leads to the foreign right not being recognized, and hence, it being extinguished in the Member State B.

In case *KKO 2016:46,* A had delivered metal sheets to be used in manufacturing doors to B. Before the delivery, the parties had agreed on a retention of title clause and that the metal sheets were not to be used before the purchase price had been paid. B was put into bankruptcy after the delivery, but before B had paid the purchase price. As the bankruptcy estate had not shown that A would have, contrary to the contract term, accepted use of the metal sheets already before payment, the retention of title clause was valid.[98]

According to the Supreme Court, the retention of title clause and the prohibition to attach the asset may have been agreed on in such circumstances that the buyer is seen to have had the right to attach the asset to other property regardless of the clause that prohibits this. According to the Supreme Court, a retention of title clause and the prohibition to attach the asset may have been agreed on in such circumstances that the buyer is seen to have had the right to attach the asset to other property notwithstanding the restriction in the contract. In such situation, the literal form

[96] Government's proposal 26/2003, detailed reasoning, chapter 5, section 7. See also Tuomisto 2005, pp. 502–503.
[97] Tepora 1992, p. 354.
[98] KKO 2016:46.

of the agreement cannot be seen to coincide with the real intention of the contracting parties. Instead, it is essential what the seller has been able to conclude based on the circumstances and how the seller has responded and reacted to the circumstances. The contract, however, has a central position in the assessment. If the bankruptcy estate claims that the buyer has been entitled to attach the sheets to other property before they have been fully paid by the buyer, it has to substantiate its claim. This would require that the bankruptcy estates shows that the seller should have realized that the sheets were going to be used before they were paid for and that the seller had taken an acceptable approach to that.[99]

KKO 2016:46 is the first decision delivered by the Supreme Court after the new Bankruptcy Act came to force that deals with third-party effects of retention of title clauses. What is interesting in the decision is how the court has argued about putting the burden of proof on the bankruptcy estate in item 11 of the reasoning. Two observations can be made based on it. First, it appears from the wording of it that an objective assessment is to be adopted: "the seller *should have realized*". Second, it seems that even an implicit acceptance is enough, and express consent is not needed: "and that the seller *had taken an acceptable approach* to that".[100]

The decision KKO 1990:104 was given before the current Bankruptcy Act came into force. In this case, a retention of title clause had been effective and valid towards third persons even though the buyer, B, had had the right to assign the asset further during the loan period.[101]

A had sold assets to B with a retention of title clause. B had then been gone into liquidation, and the liquidator had sold, among other thing, B's current assets to C, to which items sold by A belonged. After B had gone into bankruptcy, C had paid the purchase price to B's bankruptcy estate. When C had made the purchase, it should have been prepared that there might be rights of third persons directed at the assets. C had, however, failed to look into whether B could validly assign the objects belonging to its current assets. The clause had been binding on C, and B had not been entitled to keep the purchase price it had received from C due to the purchase.

[99] Pusa 2016. See also Kieninger 2004, p. 434.
[100] The Finnish wording ("- - *ja myyjä on suhtautunut tähän hyväksyvästi*") leaves it somewhat ambiguous whether the seller has given the acceptance expressly or implicitly. It seems, however, more reasoned that mere implicit acceptance is enough. See the judgment, item 11.
[101] KKO 1990:104. See also Tuomisto 1993, p. 115.

The later purchase breached the retention of title clause and the original contract. Hence, B's bankruptcy estate and C were jointly and severally liable to pay the purchase price to A.

KKO 1977 I 4 was also decided before the current Bankruptcy Act came to force. According to a procurement contract between A and B, A had been entitled to use the windows, which it had bought from B, into buildings already before their purchase price had been paid, unless B had objected to that before A had mounted the windows. A was put into bankruptcy. Since B, after delivering the windows to the construction site, had not used its right to prevent attaching the windows, the clause was ineffective and invalid towards A's bankruptcy estate.[102]

KKO 1971 II 102 and KKO 1968 II 53 were also given before the current Bankruptcy Act. In KKO 1971 II 102, according to a delivery contract between companies A and B, A had been entitled to use the assets that it had bought from B to furniture manufacturing even before the purchase price had been fully paid. Thus, the retention of title clause was seen as invalid and ineffective towards third parties. In KKO 1968 II 53, a retention of title clause was seen as invalid and ineffective towards the buyer's later assignee as the buyer was entitled to attach the assets to a construction during the loan period.[103]

When decisions KKO 1968 II 53 and KKO 1990:104 are compared, the legal state seems unclear. The Government's Proposal to the current Bankruptcy Act states that Chapter 5, Section 7 can be considered to correspond the then-current state of law. In other words, it did not change the legal position, but merely worked as a codification. In general, the Proposal puts on the liquidator and the bankruptcy estate the obligation to examine whether there are rights belonging to third parties, such as specific agreements with third parties. However, in case the original seller has practically transferred his right of ownership to the buyer so that the buyer's position is *de facto* like the position of an owner, the right is not enforceable. If the buyer has the right to dispose of the asset during the loan period as if he was the owner, there is no need to protect the original seller's right of ownership.[104]

[102] KKO 1977 I 4. On the invalidity of a retention of clause in a situation, where the buyer had right to sell the goods before payment of the purchase price, see Kieninger – Graziadei 2004, p. 434.
[103] KKO 1971 II 102; KKO 1968 II 53.
[104] See government's proposal 26/2003, detailed reasoning, chapter 5, section 7.

Case KKO 1990:104 seems to constitute an exception to the established legal praxis. It is the only case in which this approach has been taken, and the court has not maintained its opinion. Instead, it appears to have overruled this case in the later decision KKO 2016:46, which corresponds the current wording of the new Bankruptcy Act. Consequently, according to the established legal praxis and the codified law, a retention of title clause is not effective against third parties, if the buyer is entitled to assign the asset further or attach it to other property before he has paid the purchase price to the seller.

Moreover, there are clear divergences between Finnish and German *numerus clausus* regimes of property law. The Finnish conditions for retention of title clauses described above are not recognized and applied in the *numerus clausus* regime of Germany, where more flexible forms of retention of title clauses are allowed.

2.3 Solutions proposed in literature to reduce the problems of *lex rei sitae*

2.3.1 On the principle of perpetuality of property rights

Buure-Hägglund has argued for the sake of applying a principle called principle of perpetuality of property rights to foreign proprietary security rights as well. According to her, if an object encumbered by a German proprietary security right, a retention of ownership, is transferred to Finland, the principle of perpetuality of property rights should be applied by a Finnish court. [105]

The principle of perpetuality states that as a rule, transfer of a foreign property right does not affect the perpetuality of the right. The problem is, however, that this principle has traditionally been seen to apply to transfer of ownership and in principal also to traditional forms of pledge. Instead, it has formerly been considered not to apply to non-possessory forms of proprietary security rights. A foreign right of non-possessory pledge has usually been considered to have extinguished if this kind of pledge has been transferred to Finland.[106] This strict interpretation has later been changed into a more flexible way. However, the newer "soft way" is only applicable if nothing significant happens "property law-wise". As it is always something

[105] Buure-Hägglund 1978, p. 201.
[106] Alanen 1965, p. 222.

significant that actualizes the change of the applicable legal regime, the newer approach actually changes nothing. If a German retention of title clause is considered substantially similar to a non-possessory pledge, which is what it most closely resembles, the outcome is an extinguished proprietary security right.[107] It is the mixed nature of retention of title – partly right of ownership, partly non-possessory pledge – that makes it complicated. This is why the principle of perpetuality does not offer a satisfactory solution to *Statutenwechsel* problems with a more complicated German retention of title.

2.3.2 Expected or unexpected movement?

Nordic case law and academic discussion have proposed a creditor-friendly alternative to cases with cross-border use of retention of title clauses. This is the possibility to differentiate choice-of-law situations on the basis of the secured creditor's awareness, or the absence of his awareness, that the movable asset would be transferred to a new jurisdiction with different preconditions and requirements for third-party effectiveness.[108] These developments, even though they have not taken place in Finland, but in Denmark and Sweden, are important to take into account. Moreover, as this thesis concerns a possible path of development by the ECJ, the Court's dependencies on its Member States have to be taken into account.[109]

According to the idea, situation in which the seller-creditor has not been aware or could not have reasonably expected the encumbered asset to be moved to another jurisdiction, receives a gentler treatment with regard to the applicable substantive law so that the law of the State of origin prevails. Then again, had the seller-creditor been aware or had he had reasonable grounds to expect that the asset would be moved to a new state after its creation, the creditor would not receive this protection. Instead, normal conflict rules would apply in the second option.[110]

Grace period is a proposal to facilitate the *Statutenwechsel* situations derived from the inflexible application of *lex rei sitae*. The theory's main point is to set a time period of approximately three

[107] Koulu 2005, pp. 206 – 211.
[108] Bogdan 2014, pp. 272–275; Juutilainen 2015, pp. 66–67. See also Juutilainen 2015, p. 66 and Juutilainen 2005, pp. 106–109.
[109] Gless – Martin 2013, p. 38.
[110] Bogdan 2014, pp. 272–275; Juutilainen 2015, pp. 66–67. See also Juutilainen 2015, p. 66 and Juutilainen 2005, pp. 106–109.

to four months after the asset has been moved to a new jurisdiction, during which the proprietary security right remains valid even if it does not fulfil the preconditions for third-party effectiveness in Member State B, the forum jurisdiction. The core idea behind the grace period is to provide the holder of the security right with a chance to comply with the special requirements laid down by the substantive law of the respective host jurisdiction.[111] Grace period could be applied to situations where the seller's prediction or awareness of a future transfer of the object cannot be required.[112]

Germany, as a liberal jurisdiction with regard to both domestic and foreign proprietary security rights, has an overall tendency to provide foreign creditors with protection in *Statutenwechsel* situations. Since Germany is a model example of a civil law jurisdiction – contrary to the UK, for instance – codified rules are of most significance to its legal order. Hence, it is clear that the case law strongly resonates with the legislation, as it does with regard to the treatment of foreign proprietary security rights. To a Member State with exceptionally broad range of security devices available, it is logical to apply the universal principle of reciprocity and mutually recognize and enforce foreign security rights.[113]

As a result, Article 43(2) of the EGBGB (Introductory Law to the Civil Code), the basic rule with regard to *Statutenwechsel* situations, sets forth two rules which mirror the underlying values, namely liberal attitude towards foreign security rights. According to the Article, continuity and perpetuance of a proprietary right created in a foreign jurisdiction form the starting point. However, the Article also states that they cannot be fulfilled against the law of this Member State B. While importance of perpetuance of security rights created under the initial forum jurisdiction is highlighted, this however cannot infringe the law of the new forum jurisdiction, whose sovereignty and legislative competence needs to be recognized.[114]

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[111] Snijders 2006, pp. 156–157, 159; von Bar and Drobnig – von Bar 2004, p. 469.
[112] Juutilainen 2005, pp. 104–106; Roth 2008, pp. 57–58.
[113] Droblig 2004, pp. 152 – 153; Kieninger 2004, p. 655.
[114] Drobnig – von Bar 2004, pp. 152–153. See also Juutilainen 2015, pp. 222–223. Here, an analogy can be drawn draws to the EU internal market logic in general, as the two converging principles resemble the division of labour between the trade barrier ban with free movement of goods (Article 34 TFEU) and the exception article, the justification grounds (Article 36 TFEU) as well as the relationship between the article on free movement of capital (Article 63 TFEU) and Article 65 on overriding requirements of the general interest. An interesting point to notice is the mutual hierarchy of these competing norms: as equal in the legal hierarchy (either in a treaty or in a national legislation), none of them can prevail in a conflict merely due to legal status. This is why case-specific balancing and weighing is always present in the internal market law.

German Federal Court of Justice delivered a judgment BGHZ 45, 95 based on the Article 43(2) in 1966. The case concerned situations with foreign retention of title clauses and initial invalidity. The court was willing to recognize the clause and hold it effective. However, the clause turned out to had originally been invalid with regard to third-party effects, as it had been agreed on orally and without fulfilling the requirements for third-party effectiveness of its initial location, Italy. It was interesting that the Italian invalid clause would have been effective and binding in Germany, whose law did not know retention of title clauses that were binding only between the contracting parties – the clause would only be fully effective or not at all.[115]

The court nevertheless decided to take the parties' intention and the purpose of their transaction into account, and went even further. The court formulated an artificial construction of the buyer's "obligation" to transfer the ownership of the goods back to the seller upon their arrival to Germany. Now that German law governed the retransfer and its effects against third parties, the initial invalidity was "removed".[116] The German judgment is a good example of Germany's liberal, flexible attitude towards foreign proprietary rights. It also demonstrates the country's appreciation of the principle of reciprocity by showing that the German courts are prepared and willing to recognize foreign rights.[117]

Juutilainen has ended up dividing *Statutenwechsel* situations with retention of title clauses into two groups. The first group consists of situations, where the seller has been able to predict at the moment of making the agreement that the object could *de facto* be located in a different country later on during the loan period, and situations, where this kind of prediction cannot have been present. The first group – prediction has been possible – can further be divided into the following situations: (1) it was the parties' intention to transfer the object to the Member State B, (2) the seller was aware of the buyer's intent to transfer the object to Member State B, or (3) the seller should have been aware of the buyer's intent of transferring the object to Member State B. *Juutilainen* has then continued that whether the seller has, one way or another, been or if he should have been aware and has thus been able to predict the transfer, he cannot be given better protection than a local seller/creditor would receive.[118]

[115] The judgment BGHZ 45, 95 (2 February 1966), pp. 96–97.
[116] The judgment, pp. 98–101. See also Juutilainen 2015, pp. 223–224 and Drobnig – von Bar 2004, pp. 153–154.
[117] Drobnig – von Bar 2004, pp. 344–345.
[118] Juutilainen 2005, pp. 83–85.

A significant inspiration to *Juutilainen*'s theory has been the principle of import country law which, according to *Juutilainen*, could be applicable to the Finnish system as itself. The principle states that when an expected move of an object is concerned, the law of the new *situs* governs the possible third-party conflicts. This view is supported by the fact that Swedish law has a considerably similar approach when it comes to expected import situations.[119]

The first judgment delivered by the Supreme Court of Sweden on a foreign retention of title clause and its third-party effects was NJA 1978 p. 593. The case, much like my own practice case "*Y GmbH vs. Finland*", dealt with a German contract of sale with a retention of title clause between German seller and Swedish buyer. The clause in question was effective in the German *numerus clausus*, but ineffective vis-à-vis third parties in Sweden as it allowed resale of the encumbered objects. The thing is, similarly to Finnish law and unlike to German law, Swedish law does not recognize other than the so called simple retention of title clauses. The Supreme Court of Sweden ended up regarding the German clause not enforceable against the third parties in question, namely the buyer's creditors.[120] This can be seen as pure and direct application of the *lex rei sitae* rule: the German right lost its third party effectiveness as it was transferred to a new jurisdiction, in which it was seen invalid[121].

The second judgment, NJA 1984 p. 693, shed more light on the issue in Sweden. This case dealt with security transfer of ownership: the ownership of a car that had been registered in Germany was used as security for a German savings bank as the bank had extended a loan for the buyer for purchasing the car. The security ownership was supposed to be transferred back to the owner of the car – the security-provider debtor – as he had repaid the loan. At the moment of creating the proprietary security right, Germany was the location of the car. The buyer-debtor had connections to both Germany and Sweden, and had lent the car to another person who drove it to Sweden. When the car was located in Sweden, Swedish Tax Authorities used their right of distraint for the buyer-debtor's tax debts in Sweden. The issue then became of whether the Tax Authorities had been entitled to the distraint as the German savings bank had the security ownership, a proprietary security right, for the car. However, a pre-question was to be solved

[119] Juutilainen 2005, p. 113. The principle of import country law, *princippet om importlandets ret*, has gained some ground through two rulings by the Supreme Court of Denmark, UfR 1983.311 H and UfR 1984.8 H. See Juutilainen 2015, pp. 219–220.
[120] Juutilainen 2015, pp. 216–219.
[121] Persson 1998, pp. 676–677.

first: was the German security transfer recognizable and enforceable in Sweden, even though the Swedish substantive law required fulfillment of certain publicity preconditions that were not required under German substantive law?[122]

The Swedish court ended up delivering a rather elaborative, yet simple ruling. It settled the case by cancelling the Swedish Tax Authorities' distraint and stated that as a starting point, foreign, originally valid and binding proprietary right remains valid and binding even after it has been transferred to Sweden. This principle got support from the principle of reciprocity: if valid Swedish rights should be recognized and enforced elsewhere, Sweden should also provide the same treatment to rights "imported" from other jurisdictions.[123]

However, the main rule was not without exceptions, the extent of which was to be kept narrow. First, the foreign right would be non-enforceable in Sweden, even if it was validly created, if it was presumed at the moment of contracting that it would be transferred to Sweden. The second exception follows the first one's logic: if the creditor should have presumed that the object would probably be exported to Sweden due to the buyer-debtor's strong connections to Sweden, there would be no enforcement in Sweden – the creditor should simply have taken this possibility into account while disposition of the asset. The third exception concerns situations that resemble the idea of grace period. After some period of time has elapsed since the object was transferred to Sweden, there is no longer need for the foreign right to remain effective.[124]

The judgment NJA 1984 p. 693 fits well with an idea of division of unforeseeability costs resulting from *Statutenwechsel* situations, which Juutilainen has taken as one of his leading objectives in his doctoral dissertation on secured credit in Europe, the other two objectives being foreseeability and responsiveness. The judgment also partly represents what the notion of transnational conception of justice includes, such as the concept of reciprocity.[125]

Koulu considers it important that with an object that is being brought from Germany to Finland and which has been encumbered by a retention of title, the retention of title extinguishes if the agreement between the parties allows the buyer to sell the asset to another country and the seller

[122] The judgment (NJA 1984), p. 698; see also Juutilainen 2015, p. 2017.
[123] The judgment (NJA 1984), p. 699.
[124] *Ibid*.
[125] See Juutilainen 2015, pp. 109–112.

was aware of the buyer's intention to transfer the asset to another country.[126] The principle of import country law has taken into account the uncertainty and unpredictability of *Statutenwechsel* situations. However, even this approach is not without doubts and drawbacks. First and foremost, evidence about the seller's awareness may be difficult to obtain even if certain presumption is used.[127] Moreover, despite the institutional support by Danish and Swedish courts and *Juutilainen*'s proposal to extend its use, the principle still enjoys merely doctrinal support in Finland, where it is yet to be applied to actual cases. Therefore, it provides only insecure solution and my research questions remain valid. However, the judgments elaborated above could work as inspiration for the ECJ, if a preliminary ruling came before it.

According to *Juutilainen*, when the seller has not been and could not have been aware of the buyer's intention to transfer the object to a different jurisdiction with different *numerus clausus*, the applicable rule used by the respectable Member State B needs to be a compromise between the rights of the seller and the third persons entitled to the object. The seller's need for protection becomes more considerable, if the object has been transferred to the Member State B without the seller's awareness or, particularly, against the agreement between the parties.[128]

For these situations, *Juutilainen* has proposed application of the so called transposition doctrine. According to the doctrine, the foreign retention of title clause is "replaced" with a local, domestic clause – thus, the doctrine is also called domestication or substitution. If the clause has been binding on third persons in the Member State A, the original country, it will remain binding also in Member State B. I will revert to the idea of transposition in Chapter 2.5.[129]

2.3.3 *Lex registrationis* – a black horse running for rescue?

Lex registrationis could offer a feasible solution since it manages to avoid the usual drawbacks of the *lex rei sitae* rule by focusing on the state of the relevant registry as the decisive connecting factor. This means application of the law of the country of origin as the country of the registry is usually the one where the proprietary security right is created.[130] *Lex registrationis* usually

[126] Koulu 2005, p. 213.
[127] Juutilainen 2015, pp. 217–222; Koulu 2005, p. 213.
[128] Juutilainen 2005, pp. 102–104.
[129] Juutilainen 2005, pp. 106–109 and 114.
[130] Drobnig 2004, pp. 149–150; Polak 2006, pp. 126–127. See also Sprankling 2014, pp. 356–357.

concerns major means of transport, such as ships and aircraft.[131] Convention on international interests in mobile equipment, Cape Town Convention of 2001, regulates movable means of transport. This includes highly valuable objects, such as trains, airplanes and ships.[132]

However, not all Member States have enacted the *lex registrationis* rule. Therefore, it cannot be trustworthy to rely on its application in cross-border conflicts as the applicable substantive law may prove unexpected from the creditor's point of view. Since most Member States have chosen to apply the traditional *lex rei sitae*, a conflict between these two approaches might turn out to be even more confusing than the situation with the mere *lex rei sitae* rule.

A vivid example of a cross-border conflict involving these divergent conflict rules is case *Blue Sky One Ltd & Ors v Mahan Air & Anor*, decided by the High Court of Justice of England and Wales on 25 March 2010. The relevant part of the case between the UK and the Netherlands with regard to cross-border use of proprietary security rights was the question which law governs the validity of a mortgage over an aircraft. The aircraft was registered in the United Kingdom but when the mortgage was created, its location was the Netherlands. Here, it is crucial to notice that English substantive law recognized the mortgage as valid, while the Dutch law considered it invalid. The relevant English conflict rule was *lex rei sitae*, whereas the Netherlands used *lex registrationis*. This resulted in a situation where a dilemma of *renvoi* was also present.[133]

As the aircraft was located in the Netherlands at the time of creation of the mortgage, it was a Dutch court to decide on the substantive matter. As the Dutch law did not recognize the mortgage, applying solely the Dutch substantive law could have resulted in a negative outcome with regard to enforceability against the mortgagor. On the other hand, if the court was to apply Dutch private international law, it would mean accepting *renvoi* by referring the case back to English law. This choice would therefore be preferable concerning the enforceability of the mortgage as it was recognized in the English substantive law. The case demonstrates that not only are the divergences in national substantive laws threats to cross-border legal certainty in

[131] Juutilainen 2015, p. 67; 194.
[132] Convention on International Interests in Mobile Equipment, Cape Town, 13 November 2001. See also Akkermans 2008, p. 493; Polak 2006, p. 126.
[133] Forsyth 2010, pp. 637–639. See also Juutilainen 2015, p. 80. *Renvoi* means "double-applying" the relevant conflict rules. It actualizes when the relevant private international law has chosen the law of State A to apply, and when applying this law means applying also its conflict rules which, in turn, refer to the law of another jurisdiction, State B. See Liukkunen 2012, p. 22–23.

that they may result in different outcomes on the same conflict, but that also the divergences concerning the use of *renvoi* may affect the outcome in an unpredictable manner. Had the *lex rei sitae* rule been in use in both the United Kingdom and the Netherlands, without acceptance of *renvoi*, the applicable substantive law would have been Dutch law. Then again, had both States opted for the *lex regisrationis* rule, it would have been English substantive law to apply.[134]

Lex contractus is another alternative to *lex rei sitae*. However, it cannot be seen as feasible when property law and relations to third parties are concerned, as has also been pointed out.[135] *Lex registrationis*, on the other hand, could provide a feasible alternative to *lex rei sitae* in *Statutenwechsel* situations in Finland. Finland could follow the model of Norway, where a sale pledge – an equivalent to retention of title clause – is possible to register in a movable goods register, (*irtaimistorekisteri*, *løsoreregisteret*) if the object itself can be registered[136]. This could be an applicable alternative to for example automobiles that are already registered in one country – registering them in a security register would not be a far-fetched step. It would also significantly lessen problems caused to foreign sellers in cases where the object has been transferred to an unexpected country and the validity of the security right has been up to the new jurisdiction.[137] Registration of the foreign right as itself within a certain grace period might prove a feasible alternative both in the light of the domestic legal order and its publicity concerns as well as for the foreign seller-creditor, whose right would not face the risk of extinguishing[138].

[134] It is worth remembering that the Netherlands can be seen as a strict jurisdiction, while the United Kingdom falls to the liberal category in their attitude towards divergent proprietary security rights and the principle of *numerus clausus.* This attitude is seen in the Member States' attitude towards accepting the validity of the mortgage. See Kieninger 2004, p. 655.
[135] See Juutilainen 2005, p. 112.
[136] See Falkanger, TfR 1987, p. 224; Tepora 1992, p. 356.
[137] Polak 2006, p. 126.
[138] Roth 2008, p. 56–57.

2.4 The national court's three choices: pure recognition, transposition or refusal to enforce the foreign right

2.4.1 "Pure" recognition of a foreign proprietary security right in Member State B – the most optimal way to apply fundamental freedoms?

The most optimal means of treating foreign proprietary security rights is to recognize them as they are, as validly created foreign security rights. When a foreign right is recognized, their legal effects are the same as they were in the jurisdiction in which they were created.[139] To accept the foreign right as its current form into the host jurisdiction would mean application of the law of the Member State A to the right. Likelihood for accepting this approach depends on the host-state's attitudes towards applying foreign law.[140] As it is, most courts tend to apply their own law, which makes pure recognition rarer in practice[141].

Roth proposes that the "state of origin principle" developed already in *Cassis de Dijon* case law could be applicable to foreign security rights as well. However, this rule has been stated by the ECJ to belong to the primary EU law, which is why it cannot be relevant anymore. This is still no excuse for Member States to not recognize foreign proprietary security rights.[142]

An effective application of fundamental freedoms may even require Member States to recognize validly created foreign rights. This has been stated in three judgments of the ECJ, *Centros*, *Überseering* and *Inspire Art*, which all concerned freedom of establishment in another Member State.[143] In *Uberseering*, the Court held that a corporation that has been validly established in accordance with the law of a Member State, must be recognized in other Member States[144]. This shows the ECJ's approach to interpret the fundamental freedoms in a way to set the Member States an obligation to give recognition to the legal provisions of other Member States[145].

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[139] Roth 2008, p. 44.
[140] Akkermans – Ramaekers 2012, pp. 5–6.
[141] Liukkunen 2012, p. 7.
[142] Roth 2008, p. 44.
[143] Cases C-167/01 *Inspire Art* (2003) ECR I-10155, C-212/97 *Centros* (1999) ECR I-1459 and C-208/00 *Überseering* (2002) ECR I-9919.
[144] Case C-208/00 *Überseering* (2002) ECR I-9919.
[145] See, for example, case C-514/03 *Commission v. Spain* (2006) I-963, para. 27.

2.4.2 Transposition as a subsidiary means of recognition – a solution?

Transposition might provide an alleviation to *Statutenwechsel* situations. When transposition works accordingly, the security right attached to an asset which has crossed the borders between jurisdictions A and B will be given the status of a functionally equivalent national security right. This is done by *transposing* the original right into a respective new right known to the *numerus clausus* regime of the Member State B. The method can be seen as a subsidiary means to recognize a foreign right. To transpose the original right thus means not recognizing it as such, as the original foreign right it was when it was moved across the border, but instead as a security right which is accepted and recognized within the *numerus clausus* regime of the new *situs* jurisdiction. Through transposition, or assimilation as *Roth* puts it, the validly created security right will not extinguish after entering the jurisdiction of Member State B.[146]

A vivid example of the transposition method is a German case BGH 20 March from 1963. It concerned a French truck that had been encumbered by a right of pledge, *gage sur véhicule*, in France. The car was transferred to Germany, where it was seized due to the buyer's outstanding debt. The Supreme Court of Germany, *Bundesgerichtshof*, stated that the German law did not recognize a non-possessory pledge to a car equivalent to the pledge at hand. However, as this right was close to German assignment by way of security, the French creditor had to be given the same privileged position as the assignee of the German right would have.[147]

Roth has stated that in recognizing foreign rights, a Member State has to treat the foreign rights in a non-discriminatory manner, even though they might be unknown to the domestic jurisdiction. Here, the non-discriminatory treatment means treating the right in the same way as the legal order treats the right's domestic counterpart. *Roth* continues by stating that in case a functionally equivalent security rights cannot be found in the respective jurisdiction, the foreign right needs to be assessed and classified against the legal background of its original location. This approach requires that the foreign right's priority and relationship among other rights need

[146] Roth 2008, p. 40; Akkermans 2008, p. 492. See also Koulu 2005, p. 199.
[147] Kieninger 2004, p. 18.

to follow what they were in the Member State A where the right was created. The result should be without any disadvantages to the foreign right.[148]

Koulu considers transposition as a completely sufficient solution to the *Statutenwechsel* problem.[149] However, there are reasons to support the opposite. Transposition has the potential to work, but it may be more complicated in practice due to public policy choices and the principle of *numerus clausus*. The doctrine will only work if the new jurisdiction can offer a functionally equivalent right. As *Akkermans* points out, the outcome of transposition may not always be what the holder of the right would appreciate. The rights that are granted under the host jurisdiction will not always compare to rights that were created in the Member State A.[150] A transposition will only be fully effective if the Member State B can actually transpose the original right into a functional equivalent known to it. As *Roth* puts it, it is possible that the host jurisdiction does not recognize any kind of non-possessory pledges and will therefore simply consider them effective only *inter partes*, between the contractual parties.[151] There are many examples in which the holder of the right has lost either all or part of his right due to incorrectly functioning transposition. One of these is the case *Sisal* discussed above.[152]

Drobnig and *von Bar* had a wide report made on European contract and property law in which the findings were based on questions that legal practitioners were asked. One of these questions was this: "Have problems arisen in business transactions with foreign parties because of differences in the legal rules governing acquisition and loss of ownership of movable property?[153] The study showed that divergences between the capability and even willingness to recognize foreign security rights in the Member State B and transpose them into local counterparties exist across Europe. Particularly non-possessory pledges and retention of title clauses divide views among Member States.[154]

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[148] Roth 2008, p. 61. As will be further elaborated later on, I have ended up supporting *Roth*'s conclusion of preserving diversity, but at the same time combating *Statutenwechsel* problems by promoting the unimpeded access for foreign traders to the export markets of the Member State B.
[149] According to *Koulu*, transposition is generally problematic, if "superficial national differences" are not exaggerated. Koulu 2005, p. 210–211.
[150] Roth 2008, p. 55–56.
[151] Roth 2008, p. 40.
[152] Akkermans 2008, p. 492; Kieninger 1996b, pp. 47–50.
[153] Von Bar – Drobnig 2004, p. 432.
[154] Drobnig 2006, pp. 113 – 115.

Value-driven policy choices lead to construction of the national closed property law regime. Member States bear significant differences on their approach to accepting and enforcing validly created foreign security rights. The greatest divergences concern non-possessory security rights, such as retention of title. Some Member States, such as Germany, accept a wide range of modern security rights to enhance the prosperous functioning of both domestic and international trade. Non-possessory security rights can indeed be considered more common and beneficial in the context of modern international trade – they do not require the creditor to possess the encumbered assets due to which the debtor can continue harnessing the assets in its daily business.[155] Particularly extensions of retention of title are often seen as pointless attempts to encumber a movable object with a non-possessory security right. These rights are effective only in Germany, Portugal and the UK. Instead, simple retention of title clauses are treated more favourably and almost similarly throughout Europe.[156]

Kieninger has divided European countries into two groups with regard to their attitude towards the strictness of requirements for publicity and specificity of encumbered assets within that jurisdiction. The attitude actualizes when the respective jurisdiction faces the challenge to recognize a foreign security right. Finland, Sweden, the Netherlands, Denmark, Austria, Spain, France, Portugal, Scotland, Belgium and Italy are strict jurisdictions. According to *Kieninger*, these systems approach non-possessory security rights with a "comparatively hostile attitude". The liberal jurisdictions, in turn, include Germany, Greece, Ireland and England, which generally have a much more flexible attitude towards foreign security rights in movables.[157]

2.4.3 Refusal to recognize

The third option for the court is to simply refuse recognition and enforcement of the foreign right. This is a possibility, if the foreign right is so unknown to the national *numerus clausus* that it is decided not to be given any property effect. Application of this refusal-policy is usually a consequence of the public policy in the respective jurisdiction, where rights of third parties are considered more valuable than foreign creditors that use non-publishable, unknown rights

[155] Kieninger 2004, pp. 652–656; Kieninger 1996b, pp. 43–47.
[156] Akkermans 2008, pp. 492 – 493; Kieninger 2004, p. 658, 661– 662.
[157] Kieninger 2004, pp. 655. See also Drobnig 2006, p. 114.

to the host jurisdiction. However, this approach is in breach of the concept of reciprocity which is appreciated in most countries.[158]

According to *Kieninger*, it is quite frequent that the *numerus clausus* of the Member State B forms an obstacle to proper recognition and enforcement of foreign property rights. An example of poor transposition – or should I say, refusal to even recognize the foreign right – is a case decided in 25 June 1964 by Belgian *Rechtbank van Koophandel te Kortrijk*[159]. A German company sold and delivered goods to the buyer, a Belgian company with a retention of title clause. The buyer became insolvent before having paid the full purchase price, which led the seller trying to recover his goods in the Belgian insolvency proceedings. The Belgian law governed the question of whether the retention of title was effective against third parties, and it held the German right invalid. Even transposition could not have worked as Belgian *numerus clausus* did not know any functionally equivalent right to the German retention of title. It was further stated in the decision that Belgian courts deny the validity of reservation of ownership clauses in a continuous manner and especially when there is competition between the retention of title creditor and other creditors.[160]

Another good illustration is a German-Italian case decided in 1956 by the Court of Appeal of Milan[161]. The German seller had sold goods to an Italian company using a retention of title clause. The goods were transferred to Italy, where the buyer was became insolvent before the purchase price had been fully paid. The applicable Italian law required a valid retention of title to be contained in a document with a date that had been ascertained. This requirement demanded it being acquired through, for example, registration of the document or through notarial verification. The German seller had not known about this formal requirement, and consequently, his right could not be enforced by the Italian court. The outcome was not even transposition, but plain non-recognition which resulted in the German seller losing his security.[162]

Yet another vivid example of refusal is the case of *Société DIAC* from 3 March 1867 which is still applied nowadays by *Cour de cassation*, the Supreme Court of France. A German company

[158] Akkermans – Ramaekers 2012, p. 6 and 8–10.
[159] 25.6.1964 Rechtskundig Weekblad 1964, p. 271.
[160] 25.6.1964 Rechtskundig Weekblad 1964, p. 271; Kieninger 1996b, p. 50.
[161] Corte d'appello Milano 6 April 1956, Foro it. 1957 I 1856.
[162] Kieninger 1996b, pp. 47–48.

DIAC had extended a loan to another German company for purchasing a car. The pledge included a retention of title clause. The car was transferred to France, where a *Statutenwechsel* situation actualized. The French Court of Appeal (*Cour d'Appel*) considered the pledge prohibited in France and it was thus against French public policy. Due to wide application of *lex rei sitae*, the court refused to recognize and enforce the right.[163]

According to *Akkermans*, Member States have only a limited possibility to justify their practice of non-recognition of a foreign right under the EU internal market law. Therefore, the ECJ would probably not accept *numerus clausus* the coherence of a national system of property rights, as a valid argument from a Member State with ease.[164]

2.5 Conclusion and application to the case "*Y GmbH vs. Finland*"

> *In case "Y GmbH v. Finland", Finland does not refuse recognition of the German right, but recognition of it as itself, a foreign, more advanced type of retention of title, is not possible either. Moreover, Finland is unable to transpose the German right in full effect, since it would jeopardize the purpose of the original transaction and the non-possessory pledge which has been used. It seems that transposition is not* sufficient.

This chapter being titled as "preliminary" might lead one to ask whether its breadth is reasonable and justified. My answer is yes – exploring the research questions set in this thesis would have been superficial and even void without setting a specific concrete background with Member States whose attitudes towards foreign non-possessory property rights differ quite significantly. Furthermore, by looking into the way other Nordic courts have resolved recognition issues concerning foreign retention of title clauses originating in Germany I have been able to construe a relatively reliable basis on how Finland might resolve the same issue. This supports adopting a research method that employs Finland as the main country in a fictional case. The findings in this chapter are also relevant when it comes to how the ECJ might treat the issue.

According to *Roth*, the purpose of fundamental freedoms of the EU, namely free movement of goods and capital in this context, is first and foremost to secure that foreign traders and consumers have an undistorted access to the markets across the EU. As he points out, it is not

[163] See Akkermans – Ramaekers 2012, p. 6 and 8–10.
[164] Akkermans 2008, p. 543 – 544.

the diversity of rules as such, but the national approach and attitude towards recognizing and enforcing foreign proprietary security rights that constitutes the problem. Rules can be different, but they should not prevent foreign market actors from accessing the market of another Member State. There is still a problem that cannot be solved merely by applying the academic proposals and principles presented in this chapter. This is due to their non-coherent application throughout the Member States. Hence, applying the elaborated principles and ideas might even further jeopardize the proper functioning of the internal market.[165]

Moreover, as *Akkermans* and *Ramaekers* point out, the EU can be seen to have its own *ordre public*, which requires proper functioning of the internal market. This means that the Member States are under an obligation to reserve the public policy of the EU, i.e. remove possible barriers to cross-border trade, or at least justify them. Because of the principle of supremacy, EU law will always take priority before national law[166] Consequently, my main research question remains to be investigated further.

3 FREE MOVEMENT OF GOODS AND PROPRIETARY SECURITY RIGHTS

3.1 The structure of reasoning

As stated before, my main interest in this thesis lies in the question of whether the national measure in question – badly executed transposition or pure refusal to recognize or enforce the foreign right – can constitute a trade barrier, infringement to free movement of capital, within the meaning of Article 63 TFEU. Before this, the research done into the ECJ's case law on Article 34 TFEU and its interpretations needs to be investigated. The question is: is there a doctrine concerning proprietary security rights and the free movement of goods? If the answer is yes, the next step is whether the measure could however be justified with Article 36 TFEU and the proportionality test. If the answer is no, the Member State is prohibited to continue

[165] Roth 2008, pp. 41–42.
[166] Akkermans – Ramaekers 2012, p. 22.

application of the measure.[167] After this, it will be elaborated if this reasoning could be transferred to the field of Article 63 TFEU. Here, the interest lies in finding a bridge between proprietary security rights, or here retention of title clauses, and the movement of capital.

3.2 Institutional support: Is there applicable case law of the ECJ?

3.2.1 Cases of rules of private law

A slight institutional support might be found in the judgments of the ECJ. After *Dassonville*, the ECJ has significantly broadened the scope of a MEE – a trade barrier does not need to be "enacted" by the Member State, it does not have to be a "trading rule" or a "rule". It is merely sufficient that the Member State applies the measure as a part of consistent policy or practice.[168]

A few judgments of the Court concern rules of private law of a Member State. *CMC Motorradcenter* dealt with German case law on the contracting parties obligation to provide each other with information prior to the contract and whether this obligation constituted a MEE. It was elaborated on whether the obstacle to internal market was too uncertain as it was dependent on the customer's decision to buy or not to buy. The question on a possible trade barrier was however not excluded as the possible influences on internal market were not "insignificant". It was stated by the German Government that the obligation was justified and proportionate with regard to the aim being pursued, namely protection of the customer.[169]

As a result, the Court found no restriction or obstacle to free movement of goods. Instead, it formulated its decisive words, according to which "It follows that the restrictive effects which the said obligation to provide information might have on the free movement of goods are *too uncertain and too indirect* to warrant the conclusion that it is liable to hinder trade between Member States"[170]. The significant part, according to the Court, that even constituted a risk for the free movement of goods, was not the German rule itself, but the fact that certain dealers

[167] See, for example, Juutilainen 2015, p. 84.
[168] Barnard 2013, pp. 74–76.
[169] Case C-93/92 *CMC Motorradcenter GmbH v. Pel in Baskiciogullari* (1993) ECR I-5009.
[170] The judgment, para 12; cursives inserted by the author. At the end of the paragraph, the Court made a reference to case *Krantz*, an important judgment in which the "too uncertain and indirect" rule was also used.

refused to "perform services under the guarantee on motorcycles which have been the subject of parallel imports"[171]. This, in turn, left a lot in the hands of individual, private actors.

Nevertheless, it is important to note what the Court did not say in *CMC Motorradcenter*: it *did not deny* applicability of free movement Articles to private law of the Member States. This can be seen to mean that rules of private law could, at least in principle, bring about a trade barrier.[172]

Alsthom Atlantique[173] concerned selling of goods and private law regimes in Europe. The judgment can be read in a way as to provide support for the argument of non-recognition or non-enforcement of foreign security rights[174]. It dealt with the question of whether French case law on contract law, which dealt with a provision on the vendor's liability and which had no counterparties in the case law of other Member States, constituted a MEE. The Court stated that in an international sales agreement, the parties are in general free to choose the law applicable to their relations *inter partes* and therefore, they can avoid application of French private law[175]. The result of the Court was that no breach of free movement had taken place[176].

In accordance with Rome I Regulation, it is indeed true that in general, choice-of-law clauses of this kind are accepted between the contracting parties[177]. However, as has been stated already previously in this thesis, this possibility does not exceed to property law relations as they concern effects towards third parties. A choice-of-law clause which has effects outside the parties themselves, is rarely possible to make. Unlike mere contractual rights, property rights tend to be without use if they do not have effects against third parties, such as the debtor's followers or other creditors.[178]

[171] The judgment, para. 11.
[172] Rutgers 1999, pp. 183 – 184; Juutilainen 2015, p. 86; Kieninger 1996b, p. 54.
[173] Case C-339/89 *Alsthom Atlantique SA v. Compagnie de construction mécanique Sulzer SA* (1991) ECR I-107.
[174] At least Juutilainen has been of this opinion based on the reasoning of the Court in this case. See Juutilainen 2015, p. 86.
[175] The judgment, para. 15.
[176] The judgment, para. 16.
[177] Rome I Regulation, Article 3.
[178] See Juutilainen 2015, p. 86.

3.2.2 *Oosthoek*, *Clinique* – and the always problematic *Keck*

Oosthoek[179]and *Clinique*[180]offer two different views on how the *Keck* judgment could affect interpretation of situations similar to non-recognition and non-enforcement of foreign proprietary security rights. The ruling in *Keck* was significant in how it divided the possibly Article 34 TFEU-breaching national measures into two categories, the ones that restrict or prohibit "certain selling arrangements" and measures on the product itself. "Certain selling arrangements" would not breach Article 34 TFEU, if the provisions apply equally to all "relevant" traders that operate within the Member State in question, and if they have formally and substantially equal effect on "the marketing of domestic products and those from other Member States"[181]. Instead, as long as rules relating to the product itself were concerned, the ECJ did not change its interpretation developed in *Dassonville* and *Cassis de Dijon*[182]. The judgment has become quite controversial as the distinction has been seen as artificial and theoretical.[183]The Court has indeed later embraced the more practical *market access* test[184].

Oosthoek is a judgment delivered in 1982 that could have been settled differently, had it been given after *Keck*. *Oosthoek* concerned a Netherlands legislation that restricted the offering of products as gifts for sales promotion purposes. Even though the Court eventually found that no obstacle to internal trade was taking place, the argumentation of the judgment resembles what was stated in *Keck* over ten years later. The Court prescribed that national legislation that "restricts or prohibits certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume, because it affects marketing opportunities for the imported products". The Court then went on to state that there remains a possibility that if a producer is compelled to either "adopt his advertising or sales promotion schemes" or refrain from exercising a practice that he regards as specially effective, this may form a trade barrier

[179] Case 286/81 *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV* (1982) ECR 4575.
[180] Case C-315/92 *Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* (1994) ECR I-317.
[181] The judgment, para. 16.
[182] See the judgment, paras. 11 and 16.
[183] See for example Akkermans – Ramaekers 2012, p. 7–8.
[184] See Head 2015, pp. 37–39.

even if the national rules in question (which are different within the EU) apply equally to domestic and imported products.[185]

Kieninger has argued for the sake of that the ruling in *Oosthoek* gives valid reasons to include non-recognition and non-enforcement of foreign retention of title clauses in the scope of Article 34 TFEU. According to her, the use of retention of title clauses by the seller *can be seen as marketing of the product.* As a result, the *Oosthoek* formula (described above) applies to retention of title clauses.[186]

Kieninger goes on by stating that in a situation where the substantive law of the import country and the *lex rei sitae* rule lead to the foreign retention of title clause becoming non-recognized and non-enforced, the *Oosthoek* formula takes place. In accordance with the formulation of the judgment, this would lead the seller to either abandon the way he is used to promote his sales, or being compelled to change it, which results in his transactions becoming more expensive or difficult to carry out. In a situation like this, the seller has four choices. First, he can choose not to extend credit at all with debtors. Second, he can abandon granting credit with security and grant it without it instead, which results in growing of the costs and the risk. The third option would also increase the costs as it would be demanding personal security, in which situation financial institutions would probably become part of the arrangement. Finally, the seller could engage in creating a security which satisfies the needs of the import country. However, there is no doubt that the fourth option would be a lot more difficult for sellers originating in other Member States than in the specific country of import.[187]

According to *Kieninger*, *Oosthoek* did not lose its validity even after *Keck* was introduced. Part of this argument is how judgments after *Keck* have been written. *Clinique* concerned marketing of products of under a name "Clinique" that was liable to mislead customers, and was given after *Keck*. Here, the Court had to deal with both the concept of "certain selling arrangements" and measures on the product itself, but the Court only explicitly mentioned the measures concerning the product itself even though it made a reference to *Keck.* This reasoning – to refer to a ruling with an argument that was not even the most significant finding in the judgment in

[185] Case 286/81 *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV* (1982 ECR 4575, para. 15.
[186] Kieninger 1996b, p. 55.
[187] Kieninger 1996b, p. 56. Roth has also supported this reasoning. See Roth 2008, p. 49.

question – seems to suggest that the Court was already regretting establishment of the concept of "certain selling arrangements".[188]

Moreover, *Kieninger* argues, the reasoning in *Oosthoek* was rather similar to the arguments presented in *Cassis de Dijon*, when it came to considering the adaptation costs for a foreign seller as a result of the national measure. *Kieninger*'s third argument is the *telos* of Article 34 TFEU; how only this interpretation fits with the purpose of the Article.[189] Then again, it is to be noted that it is only the ECJ that can give valid interpretations on EU law[190]. Therefore, *Kieninger*'s third argument remains a mere opinion.

Nevertheless, *Kieninger* wrote her arguments in over two decades ago, before the ECJ had even given its first ruling based on the *market access* test. Can *Oosthoek* and *Kieninger*'s reasoning of its connections with treatment of foreign retention of title clauses be still held relevant? This question will be reverted to in chapter 3.4.

3.2.3 *Krantz*: A case with a German retention of title clause

Krantz is by far the only ruling of the ECJ that has dealt with movable property and the issues of free movement of goods, albeit not directly and in a rather disappointing manner. What is significant, is that the judgment did not refer to free movement of capital, since the current Article 63 TFEU was not directly applicable then. Consequently, the judgment or its subsequent discuss did not include elaboration of whether there might have been a restriction of freedom of capital movement which needed to be justified.[191] The case has become a subject for renewed attention due to recent developments in the Court's case law, namely use of the *market access* test. What is more, the case made it known that although property law is a highly national field of law, it still belongs to the scope of EU law. This holds true even though the triggering event in the case had, in a narrow sense, more to do with national insolvency than property law.[192]

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[188] Case C-315/92 *Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* (1994) ECR I-317, para. 13.
[189] Kieninger 1996b, pp. 58–60.
[190] Article 267 TFEU.
[191] See Roth 2008, p. 53.
[192] Akkermans – Ramaekers 2012, pp. 1–3.

Krantz dealt with a sale of a machine with a German retention of title clause to a Dutch buyer. However, after the machine had been delivered to the buyer in the Netherlands, the buyer came into financial difficulties and a liquidation process began. Since the machine was located on a land owned by the buyer, Dutch Tax Authorities seized it. As the machine was in the Netherlands, Dutch law applied and thus governed the retention of title.[193]

According to Dutch law, the seizure was allowed as they had a better priority on the debtor's property. Article 16 of the law on the collection of the State's direct taxes prescribed that "third parties who consider themselves entitled, wholly or in part, to movable property seized by reason of a tax debt - - may not bring an action against seizure on account of a tax debt - - if movable property intended for furnishing or equipping a house or farm or for cultivating or working land are on the debtor's premises at the time of seizure[194]". According to the interpretation of the Article, it extends these restrictions to cover movable property that is being used for running of an enterprise. Instead, it does not extend to raw materials or finished products found on the premises.[195] As a matter of fact, the situation *did not lead to* the Dutch court refusing to recognize or enforce the foreign retention of title right – in fact, this issue was not actually considered. The situation was simply resolved in favor of the tax authorities' right of seizure.[196]

When *Krantz* was brought before the ECJ, the claimant, a German seller, argued that the seizure, or more specifically the Netherlands law concerning the collection on direct taxes, violated the provisions granted by EU law about free movement of goods. According to him, general awareness within other Member States of the Netherlands' approach to rights of third persons in this situation would result in "considerable decline in sales on instalment terms"[197].

It was stated in the proceedings that the mentioned Article was not intended to regulate cross-border trade and, moreover, was equally applicable to domestic and imported products, which the Court accepted. According to the Court, the Dutch legislation in question applied "without distinction to both domestic and imported goods" and did not have as its purpose to control trade

[193] Case C-69/88 *H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen and Netherlands State* (1990) ECR I-583.
[194] Advocate General Darmon's Opinion on *Krantz*, para. 3.
[195] *Ibid*.
[196] See Roth 2008, p. 60.
[197] Advocate General Darmon's Opinion in *Krantz*, para. 5.

within the internal market[198]. The outcome was rather disappointing: the effects that the seizure could have on internal market were *too remote* that free movement law would apply to the case.[199] The Court stated that even though there remained a possibility for hesitation to sell goods on instalment terms by foreign traders to buyers residing in the Netherlands due to the Dutch provision, this possibility is "too uncertain and indirect to warrant the conclusion that a national provision authorizing such seizure is liable to hinder trade between Member States"[200] *Roth* has pointed out that the outcome by the Court to give priority to the Dutch enforcement provisions may suggest that the ranking and priority order among creditors is a matter that belongs to jurisdiction of the *situs* Member State.[201]

It seems that the ECJ set a certain threshold of application for Article 34 TFEU in this case, and the threshold was not met by the Netherlands legislation in question. This question will be reverted to in chapter 5 where the opinion of the advocate general behind the judgment and the opinion's possible implications will be discussed in depth.

3.3 Doctrinal support for a trade barrier in light of Article 34

3.3.1 *Some arguments supporting the existence of a trade barrier*

Doctrinal support for a trade barrier can be found in literature. Actually, arguments supporting a possible infringement of internal market law in a situation of non-recognition and non-enforcement of foreign property rights have been around since the 1990s. It is important to note that at the current moment of the EU's development, there is nothing to suggest that a positive answer to whether a trade barrier, a MEE, could *not* exist with this issue.[202]

According to *Affaki*, the current security right system in Europe does not go well with the proper functioning of the internal market due to the lack of uniformity. Bigger enterprises may engage

[198] Case C-69/88, para. 10.
[199] Case C-69/88; Akkermans – Ramaekers 2012, pp. 1–3.
[200] Case C-69/88, para. 11.
[201] Roth 2008, p. 60.
[202] See Juutilainen 2015, p. 85. On the other hand, some writers have campaigned for a less inclusive approach to the market freedoms. According to *de Sousa*, the ECJ has extended the scope of the freedoms both explicitly and impliedly – nowadays more and more situations are covered by EU law. He further argues that this development is instable and lacks a clear normative basis. See de Sousa 2011, pp. 162–163, 168.

in expensive due diligence and legal expertise, but smaller companies do not have this option.[203] *Weatherill* also acknowledges that despite an obvious lack of directly applicable case law, one could easily imagine situations in which the question of a possible trade barrier would actualize with foreign security rights. According to him, in case a trade barrier would be found, the ECJ would be needed to develop a new doctrine obliging Member States to protect foreign security interests under their national law. This practice is the same that has happened in the fields of environmental protection and consumer protection. As the Court found in *Centros, Überseering* and *Inspire Art* with regard to recognition of enterprises validly established elsewhere in the EU, refusal to recognize a foreign security right might be a trade barrier.[204]

This is where Artile 114 TFEU becomes relevant. According to it, the EU is competent to impose harmonization acts insofar as the harmonization concerns the establishment and proper functioning of the internal market. What is more, there could be competence for the EU to harmonize, if and when there is an obstacle to internal trade, such as infringement of the free movement of goods or capital. In other words, there is no general competence to harmonize. In this case, the harmonization measures taken should aim to improve the proper functioning of the internal market by attempting to remove the barrier.[205] In this regard, the existence of a trade barrier and the discussion of Article 114 TFEU and harmonization are intertwined.[206]

Kieninger's main points concerning *Keck* and *Oosthoek* have already been discussed. *Roth* has however gone in the footsteps of *Kieninger* and argued that non-recognition of validly created security right by Member State B may constitute an obstacle or restriction to the import of goods. He has viewed this practice in the light of *Keck* and elaborated the possibility of considering the use of retention of title as a "promotion measure" or "selling modality", which would be

[203] Affaki 2006, pp. 197 – 198.
[204] Weatherill 2006, pp. 134–135.
[205] Rutgers 2005, pp. 146–148 .
[206] Rutgers 2008, p. 68. A few scholars have proposed different variations of harmonization measures with regard to security rights in Europe. For example, *Snijders* and *Verstijlen* have suggested adopting a European security right. See Snijders 2006 and Verstijlen 2006. *Rank*, in turn, has suggested minimal harmonization for European security rights. He acknowledges the legal uncertainty and unpredictability brought about by cross-border situations involving tangible movables which all belong to different schemes of national property law. He restates the possible consequence of this: discouragement of potential creditors to extend loan, difficulties to obtain loan and increase in transactional costs due to increased credit risk. Rank 2006, pp. 204–206. *Rank* prefers directives with possibilities for Member States to make reservations. The use of directives does not eliminate valuable national differences and is a subtler means than the common security right proposed. While the directive should apply equally to both domestic and cross-border situations, it should also follow a restrictive and a functional approach so that it focuses on the economic functions of the security rights. Rank 2006, pp. 213 – 215.

prohibited by the case law of the ECJ in case the national law were discriminatory either *de jure* or *de facto*.[207] He further points out the role of different requirements concerning authorization or registration and how they might work as trade restrictions even though they cannot be categorized as either measures on the product itself or "certain selling arrangements".[208] *Roth*, too, states the fact that the more exclusively directed at imports the national measure is, the more likely it is to constitute a trade barrier in the meaning of Article 34 TFEU. He concludes this elaboration by stating that the practice of non-recognition or non-enforcement of foreign security rights does not seem to fall within the scope of either product requirements or selling arrangements, but instead is its own category of potentially trade-restricting MEE's.[209] This seems to give additional support for assessing these measures through the *market access* test.

Akkermans and *Ramaekers* have used the concept of mutual recognition to support their argument on interconnections between property law and the provisions on free movement of goods. According to the doctrine developed already in *Cassis de Dijon*[210], goods that have been produced and marketed lawfully in one Member State, should be recognized as valid foreign goods and their access to the markets of other Member States should be allowed, without any additional requirements that the domestic products do not need to fulfill. Could this rule be transferred to property rights? The logic is quite similar to mutual recognition with goods, but with property rights on movable objects, it is the right encumbering the movable that encounters problems in cross-border setting. Even the European Commission has suggested that it would favor extending the rule to other areas in internal market as well, which can be seen from the Commission's White Paper[211]. This approach can been seen further in the ECJ's case law on qualifications and certifications validly acquired in another Member State.[212]

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[207] Roth 2008, p. 49; see also Kieninger 1996b, p. 41, 60.

[208] On national requirements concerning recognition of a foreign professional qualifications, see case C-342/14 *X-Steuerberatungsgesellschaft v. Finanzant Hannover-Nord* (2015) ECR I-827 in which the Court stated that when there is no harmonization on how to acquire qualification for a certain occupation, Member States are free to decide on them independently as long as they respect the basic freedoms (paras. 44–47). See also case C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, paras. 37 – 38. The Court has adopted a very similar reasoning with regard to alcohol beveridges and the protection of public health in Joined cases C1/90 and C-176/90, para. 16.

[209] Roth 2008, p. 49.

[210] Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (1979) ECR I-649.

[211] White Paper from the Commission to the European Council: Completing the Internal Market, 14 June 1985, COM(85) 310 final, p. 22.

[212] Akkermans – Ramaekers 2012, p. 17–19. They have also argued that it is possible to deviate from the *lex rei sitae* rule at the EU level. See Akkermans – Ramaekers 2012, p. 23. An practical example of mutual recognition is

3.3.2 *Rutgers*

Rutgers, too, has a positive view on the question of whether non-recognition and non-enforcement of foreign retention of title clauses can constitute a trade barrier. *Rutgers*' reasoning shares some of *Kieninger*'s arguments, but they have differing views on the role of *Keck*. While *Kieninger* emphasized *Oosthoek*'s significance and denied the importance of *Keck, Rutgers* regards *Oosthoek* as a case that would have been seen in a different light, had it been decided after *Keck*. Moreover, he considers *Clinique* to be an exceptional ruling in that the Court had to handle both selling arrangements and product requirements simultaneously. Therefore, she criticizes, it is not the most valid basis for *Kieninger* to base her arguments.[213]

Rutgers has used both the *Keck* test and *access to market* test in her argumentation, but prefers the *market access* test. In order to fit the *Keck* formula, she has defined retention of title clauses as "selling and marketing arrangement". In her examination on whether the *lex rei sitae* rule gives rise to either formal or material discrimination, she ends up with that the rule does not result in formal discrimination between imported and domestic products, since the playing ground is the same for both. Instead, she finds than a material discrimination indeed takes place, if the receiving Member State cannot enforce the foreign retention of title clause due to its type being unknown to the respective Member State, in addition to which it cannot be transposed.[214]

According to *Rutgers*, if the rules of the receiving Member State prevent the foreign retention of title clause from being enforced, there is a "direct or substantial hindrance to the access of a market in that Member State"[215]. She gives an example, a German seller who cannot enforce a *verlängerter Eigentumsvorbehalt* in the Netherlands and is therefore compelled to opt for more

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case C-354/14 *Capoda Import-Export* (2015) ECR I-658 in which the ECJ repeated the principle that products that have been lawfully produced and marketed in some Member State have to be able to be marketed in any other Member State without additional controls (para. 40). However, this case concerned the traditional form of mutual recognition, water pumps and fuel filters that had been in free cirmulation in a Member State but were still subject to inspections in another State. Another quite recent judgment concerning mutual recognition and Article 34 TFEU is case C-525/14 *European Commission v. Czech Republic* (2016) ECR I-714. Here, a measure that was equivalent to quantitative restrictions could not be justified by consumer protection in a proportionate way. There were less means available that would have prejudiced the free movement of goods less than "the general refusal to recognize those hallmarks and the additional hallmarking of all precious metals marked with those hallmarks". See the judgment, para. 66. The reasoning in the case bears some obvious similarities to the argumentation presented by Akkermans and Ramaekers.

[213] Rutgers 1999, pp. 199–200.

[214] Rutgers 1999, pp. 194–195.

[215] Rutgers 1999, pp. 195 – 196.

expensive forms of security. According to her, this situation awakens the "substantial hindrance" criteria of the market access test.[216]

Juutilainen has criticized *Rutgers*' argumentation of her *Keck* test with proprietary security rights. He considers it no material hindrance to internal market, if the receiving Member State does not enforce an extended retention of title clause (*verlängerter Eigentumsvorbehalt*). In addition, he states the fact that there is not any obligation to use extended retention of title clause. Most countries accept simple retention of title clauses and only few its extended versions.[217] According to *Rutgers*, retention of title clauses can be protected by the free movement of goods, since movement of goods occurs when a chattel is moved from one Member State to another[218]. She finds rules of free movement of goods, services and capital to all be of importance. Later, she nevertheless rejects the application of the free movement of services[219]. However, there she considers it an open question whether the doctrine developed with respect to one of the freedoms can be analogically applied to other freedoms[220].

On the other hand, *Rutgers* finds it questionable whether the rules of free movement of capital includes the treatment of foreign retention of title clauses. She reasons this view with case *Société Civile Immobiliére Parodi v. Banque H. Albert de Bary et Cie*[221]. The case concerned a loan between a Dutch bank and a French company. The loan was secured by a mortgage. The company refused to repay the loan to the bank, which resulted in court proceedings in France. According to the company, the loan should have been declared void as the Dutch bank lacked the required permission by French authorities to vest mortgages. According to the ECJ, banks' practice of granting of mortgage is a service. Furthermore, it was stated that the Treaty provisions on services do not apply when a restriction of capital movement relating to such transactions is occurring at the same time. Consequently, *Rutgers* interpreted the ruling analogously to retention of title clauses and found that they do not belong to the scope of the free movement of capital.[222]

[216] Rutgers 1999, pp. 195 – 196.
[217] Juutilainen 2015, p. 89.
[218] Rutgers 1999, p. 182.
[219] Rutgers 1999, pp. 180–182.
[220] Rutgers 1999, pp. 178–182.
[221] Case C-222/95 *Société Civile Immobiliére Parodi v. Banque H. Albert de Bary et Cie* (1997) ECR I-3899.
[222] Rutgers 1999, p. 179.

Rutgers provides support for her view to exclude the free movement of capital with decision *Luisi Carbone*[223]. The case concerned the question of whether remuneration for services belongs to the ambit of the free movement of capital or the free movement of services. The ECJ held that although the physical transfer of assets is included in the list of various movements of capital, the conclusion cannot be drawn that any such transfer would in all circumstances constitute a movement of capital. Hence, the physical movement of banknotes does not constitute a movement of capital, if the obligation to pay arises from "a transaction involving the movement of goods or services"[224]. Therefore, *Rutgers* concludes that with a retention of title clause, the credit granted by the seller-creditor cannot be considered an investment, but is instead ancillary to the sale of goods.[225]

3.4 Search for the most feasible means to include proprietary security rights in Article 34 TFEU and grounds for justification

In the previous chapter, the question on institutional and doctrinal support for a possible trade barrier with regard to Article 34 TFEU was elaborated. Now, it will be investigated *how* exactly would the negative treatment of foreign retention of title clauses by the national court fit into the ambit of the Article. Could the use of extended retention of title clauses be considered "certain selling arrangements", as *Kieninger* seems to think? Or, could it be seen as an "investment arrangement" – a term derived from the *Keck* doctrine as applied to capital movements, particularly investments[226]? On the other hand, would it be better understood through the *market access* test, so that national measures substantially hindering their use could be described as "restrictions on use"[227]?

Antonaki has studied *Keck* with respect to its transferability to the free movement of capital and the Golden Shares case law. The ECJ had frequently denied the Member States' practice of

[223] Joined cases 286/82 and 26/83 *Graziana Luisi and Guiseppe Carbone v. Ministero del Tesoro* (1984) ECR I-377.
[224] The judgment, paras. 21–22, where the Court stated that movement of capital means "financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service". Instead, the current payments constituted "the consideration within the context of an underlying transaction".
[225] Rutgers 1999, p. 180.
[226] See Antoniki 2016.
[227] See case C-142/05 *Mickelsson et Roos* (2009) ECR I-4273, case *Commission v. Italy* (*Trailers;* 2009) ECR I-519, case C-432/03 *Commission v. Portugal* (2005) ECR I-9665. See also Barnard 2013, pp. 102–108.

holding certain shares in the Government's possession in privatised companies by maintaining that golden shares are by themselves retsrictions on the free movement of capital in that they have the effect of discouraging foreign investors from acquiring shares in these companies. However, the Court has not been able to establish a consistent and clear test for a restriction apart from the *market access* approach. The two most relevant categories however seem to be positive effect on capital flows and derogation from ordinary company law. The first test can be seen to have similarities with the *Keck* formula in that it might pave the way for distinguishing between restrictions on capital movements and investment arrangements: if the State was able to show that the secial rights of teh Government both encouraged foreign investors and had a positive effect on capital flows, there would not be a prohibited restriction.[228]

It is to be noted that this approach by the Court does not leave room for any *de minimis* test. This makes the approach different from the *market acess* approach that has frequently been used with the free movement of capital. This inclusivity also seems to be the underlying cause for *Antonaki* to suggest adoption of the *Keck* formula.[229]

Akkermans and *Ramaekers*, in turn, have developed the discussion in light of the famous *Trailers* case and its *market acess* approach. According to them, there are totally five categories in which a national measure may fall. The first group is quantitative restrictions which are as itself prohibited by Article 34 TFEU and to which national treatment of foreign retention of title clauses does not belong. The second option is *distinctly applicable measures* that are equivalent to quantitative restrictions[230]. This group includes measures that discriminate imported goods – or rights – against domestic products either in law or in fact, and it is not applicable here either. The third category is product characteristics that apply *indistinctly*, i.e. the object or effect of which is not to favor domestic product over foreign goods[231]. Neither this group is applicable with regard to the treatment of foreign proprietary security rights.[232]

The fourth category consists of *certain selling arrangements*, as developed in *Keck*[233]. This is also not a category in which the issue at hand could validly be placed. According to *Akkermans*

[228] Antonaki 2016, pp. 181–188.
[229]Antonaki 2016, p. 185.
[230] See case *Keck*, para. 37.
[231] See case *Keck*, para. 35.
[232] Akkermans – Ramaekers 2012, p. 8.
[233] Case Keck, para. 16.

and *Ramaekers*, if a measure does not fit into the requirements of a "certain selling arrangement" laid down in *Keck*, it is a measure with an equivalent effect to a quantitative restriction, i.e. prohibited by Article 34 TFEU. In turn, if it passes the test, it must be further assessed whether the measure either prevents or hinders market access. If it does not affect market access, it is not prohibited by Article 34.[234]

The final category which could include treatment of property rights, includes any other national measures hindering the foreign right's access to the market of Member State B.[235] Case *ANETT*[236] suggests that the *market access* is a test of residual character, aimed to catch all measures that cannot be categorized otherwise, i.e. by as distinctly applicable measures, certain selling arrangements or product characteristics[237].

It seems that the use of *market access* test by the ECJ has broadened the way for different national measures to theoretically find their way to the scope of Article 34 TFEU. The interesting thing about the test is that had the Court opted for this approach already in 1990, the outcome of *Krantz* could have been significantly different.[238] Similarly, a case similar enough to the circumstances of *Krantz* might be seen as a trade barrier at the current state of EU law.

There are differences of opinion among scholars on whether a *prima facie* prohibited national measure could however be justified and whether it would succeed the proportionality test[239]. Some, such as *Juutilainen*, have argued that creditor regimes – public policy or *ordre public* in the respective Member State – provide the strongest ground for justifying the measure in accordance with Article 36 TFEU[240].

However, the next and final step is the proportionality test, and some scholars have indeed proposed that even if the national measure would succeed with the public policy argument, it would most probably fail this test. The test demands that the measure is suitable, necessary and proportionate in order to attain its objective – a measure is only to be applied if no other measure

[234] Akkermans – Ramaekers 2012, p. 7–8.
[235] Akkermans – Ramaekers 2012, p. 7–8.
[236] Case C-456/10 *ANETT v. Administración del Estado* (2012) ECR I-241.
[237] Barnard 2013, p. 106.
[238] See Juutilainen 2015, p. 92.
[239] See Roth 2008, p. 54.
[240] Juutilainen 2015, p. 104.

is found that would restrict less the proper functioning of internal market[241]. According to *Roth*, the suitability test may be the easiest to succeed, as registration requirements and similar measures may well be *appropriate* to pursue the public policy of transparency and publicity. However, the tests of necessity and proportionality may be more difficult to satisfy.[242] Since measures which intrude less with the effective functioning of the internal market than full denial, non-recognition and non-enforcement of a foreign proprietary security right can easily be imagined, the justification will likely not succeed.[243]

4 FREE MOVEMENT OF CAPITAL AND THE RETENTION OF TITLE

4.1 Preliminary question: Does Article 63 TFEU have direct effect?

For a private party to invoke Article 63 TFEU, the Article needs to be directly effective. The ECJ has indeed ruled in *Sanz de Lera* that the current Article 63(1) – then 73b(1) EC – was directly effective[244]. Furthermore, in *A*, the Court set forth that Article 63(1) TFEU "lays down a clear and unconditional prohibition for which no implementing measure is needed and which confers rights on individuals which they can rely on before the courts"[245]. The Court further elaborated in case *A* that Article 63(1) TFEU, when used together with Articles 64 and 65 TFEU, may be invoked before national courts and may "render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question"[246]. What is more, Article 63 TFEU has shown to be positively vertically directly effective, i.e. between a state and

[241] Roth 2008, p. 54.
[242] Roth 2008, p. 54.
[243] Akkermans – Ramaekers 2011, pp. 13–15.
[244] Joined cases C-163/94, C-165/94 and C-250/94 *Criminal Proceedings against Sanz de Lera and others* (1995) ECR I-4830, para. 41.
[245] Case C-101/05 *Skatteverket v. A* (2007) ECR I-11531, para. 21. The wording of the Court resembles a lot the way the Court originally described direct effect with regard to Treaty provisions in *Van Gen den Loos*, in which it stated the famous words: "The wording of Article 12 contains a clear and unconditional prohibition - - This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional - - the very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects."
[246] Para. 27 of the judgment.

a private party[247]. It is interesting to note that the free movement of capital did not have direct effect until 1995, when the Maastricht amendments changed this[248].

4.2 Search for institutional support

4.2.1 What does the Treaty say?

The unhampered movement of capital, together with goods, persons and services, is one of the four fundamental freedoms in the EU guaranteed by treaty provisions. These freedoms constitute the internal market of the EU. Article 63(1) TFEU, the core rule on the free movement of capital, prescribes the following: "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." Here, one could easily ask, what the Treaty actually means by "capital" and what the free movement of capital *de facto* covers.

The Treaty stays silent about the accurate interpretation of '"the movement of capital" in the EU context. Instead, it allows Directive 88/361/EEC[249], Annex I to determine the meaning. This Annex is a list of capital movements to which the ECJ has often resorted. According to this list, a movement of capital takes place when "credits related to commercial transactions or to the provision of services in which a resident is participating' (item VII) are being used and 'financial loans and credits" (item VII) are granted. Further assistance is present in the preamble to the list, according to which the concept covers "all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers".[250]

By virtue of this list, its definitions and the applicable case law, any business transaction concerning a monetary credit extended between a creditor and a debtor constitutes a movement of capital. It is clear that trans-border investments are under the protection of free movement of capital. However, does this also apply to proprietary security rights? The answer is probably yes, since item IX of the list expressly includes "sureties, other guarantees and *rights of pledge*".

[247] See Barnard 2013, p. 586.
[248] Joined cases C-163, 165 & 250/94 *Sanz de Lera* (1995) ECR I-4821. See also Cruz 2002, p. 92.
[249] Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty, 24 June 1988, OJ 1988 L 178/5.
[250] See also Barnard 2013, p. 583.

4.2.2 The position of case law: What is "a movement of capital"?

There have been a few cases concerning interpretation of the Directive 88/361/EEC. In *Margarethe Ospelt*, the ECJ found that a prior-authorization requirement was not as itself contrary to the free movement of capital.[251] In *Trummer and Mayer*, the Court stated that a national provision, according to which a mortgage can only be enforced in the domestic currency, constitutes a restriction to the movement of capital.[252] In *Svensson*,[253] the Court held that it is contrary to the free movement of capital that a Member State sets a precondition for granting a government aid that the loan that has been extended for the debtor and for the repayment of which the state aid is granted, has been extended by a financial institution that has its place of establishment in the Member State in question[254].

At least the ECJ has included property law in general in its definition of capital. For example, case *Commission v. UK* demonstrated a movement of capital in investments in real property[255]. Likewise, sale of real property was seen as a movement of capital in case *Hollmann v. Fazenda Pública* (2007)[256]. What is more, also commercial granting of credit constitutes a capital movement, as the ECJ stated in *Fidium Finanz AG* (2009)[257].

Moreover, AG *La Pergola*'s opinion in *Trummer and Mayer* suggests that there is a capital movement even when the price is "deferred" so that the vendor grants the deferment to the purchaser. In the case, the seller granted the buyer a period within which the repayment had to be done. According to AG *La Pergola*, this transaction constitutes a movement of capital, if this transaction can be considered a loan. If the answer is yes, the deferment practice can be regarded

[251] Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung* (2003) ECR I-9743. However, the national measure was in question was unproportionate and was therefore prohibited.
[252] Case C-222/97 *Manfred Trummer and Peter Mayer* (1999) ECR I-1661.
[253] Case C-484/93 *Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme* (1995) ECR I-3955.
[254] The judgment, para. 19.
[255] Case C-98/01 *Commission v. UK* (2003) ECR I-4641, para. 22. See also case C-512/03 *Blanckkaert v. Inspecteur van de Belastingdienst* (2005) ECR I-7685.
[256] Case C-443/06 *Hollmann v. Fazenda Pública* (2007) ECR I-8491, para. 31.
[257] Case C-452/04 *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht* (2009) ECR I-9521, para. 43.

as a capital movement.[258] The Court did not follow this approach, but as a AG's opinion, it should be taken into account when the state of the law is being clarified[259].

This has a bearing concerning retention of title clauses, in which a deferment of the purchase price takes place. If it is acceptable to speak about a loan with regard to the use of instalment terms applied with regard to retention of title clauses, does this then mean that, according to the opinion, there is a capital movement?

4.3 Doctrinal support: Arguments proposed by scholars

4.3.2 *Roth*'s argumentation

How can a claim of retention of title clauses constituting a capital movement, be justified? Indeed, what makes *Roth* different from *Kieninger*, *Rutgers*, *Akkermans* and *Ramaekers* in this debate is his decision to include the issue within the framework of *free movement of capital*. According to *Roth*, despite the non-abundance of directly applicable case law, the present state of EU law can be assumed to be that the internal market freedoms apply to national provisions of private substantive law in case these provisions hinder cross-border movement of goods or capital. This kind of hindrance is likely to actualize when import of services or goods is made less attractive to the importer by the national mandatory provisions and their use.[260]

Roth connects proprietary security rights and movements of capital. According to him, *the freedom of capital exceeds also to security rights which are attached to assets, such as a retention of title clause*. A capital movement occurs already when a trans-border collateral is created as part of a loan agreement[261]. When the parties to a secured transaction are from different Member States, *Roth* argues, a cross-border movement of capital takes place. This, in turn, is where Article 63 becomes relevant. He argues that the scope of Article 63 (1) indeed involves cross-border security transactions when the parties to this transaction are residing in different jurisdictions or when a movable object bearing a security value is moved from one

[258] Opinion of Advocate General *La Pergola*, case C-222-/97 *Trummer and Mayer* (1999) ECR I-1663, para 9. See also Roth 2008, p. 47.
[259] Broberg – Fenger 2012, p. 445; Larion 2016, p. 102.
[260] Roth 2008, p. 42.
[261] Roth 2008, p. 47.

jurisdiction to another. According to *Roth*, a movement of capital takes place and is under an infringement when the destination state does not recognize or enforce a foreign security right.[262]

It can thus be concluded that also secured transactions in a cross-border setting between a creditor and a security-provider debtor form a capital transaction. When this legal relation actualizes so that either the debtor complies with the payment schedule accordingly or defaults the payment, the consequence of which is the creditor's right to recover the payment, a movement of capital takes place.[263]

4.3.3 *Von Wilmowsky*

According to *von Wilmowsky*, proprietary security rights that are being used in connection with forms of acquisition credit are protected by both Articles 34 and 63 TFEU. He draws this from his notion that there are two types of security transactions, the ones which depend on their underlying transaction and the ones that are independent. With regard to dependent transactions, the creation of a security right belongs to the scope of one of the four freedoms if the underlying legal relationship belongs to the scope of one of the four freedoms[264]. A retention of title is based on a sales agreement which then has to belong to the ambit of one of the freedoms[265].

With regard to the transactions dependent on the underlying legal relation, *von Wilmowsky* states that they belong to the scope of the free movement of goods if the aim of the transaction is to secure payment of the purchase price, in addition to which they belong to the scope of the free movement of capital. Then again, with respect to the category of independent transactions, there is a group of proprietary security rights that are only protected by free movement of capital. These are rights that have been granted together with a loan or which are independent of the transaction on which the security right is based.[266]

According to *Von Wilmowsky*, retention of title can be categorized within the free movement of capital. However, he mainly bases his argument on what can be interpreted based on the official

[262] Roth 2008, pp. 50–51.
[263] Von Wilmowsky 1999, pp. 36–38.
[264] Von Wilmowsky 1996, p. 77.
[265] Von Wilmowsky 1996, p. 82.
[266] Von Wilmowsky 1996, pp. 77–93.

EU documents. As was stated before, the Treaty and its supporting documents can be seen to leave space for retention of title clauses to be included in the ambit of Article 63 TFEU.

4.4 Is the doctrine on free movement of goods and proprietary security rights transferable to the field of capital?

4.4.1 Application of free movement of capital together with free movement of goods

Free movement of capital seems to have an overlap with other market freedoms. In *Casati*, the Court indeed stated: "- - freedom to move certain types of capital is, in practice, a precondition for the effective exercise of other freedoms guaranteed by the Treaty, in particular the right of establishment[267]." On the other hand, the Court has usually relied on this argumentation with *certain* market freedoms, namely free movement of establishment and services[268]. The free movement of capital has also been subject to other free movement provision prevailing it, which happened in case *Anica Milivojevic*[269]. In this case, the restrictions that the national measure caused on the free movement of capital were merely a consequence of restrictions on the free movement of services, which moved the argumentation to cover only Article 56 TFEU[270].

How does free movement of capital then go in conjunction with free movement of goods? The ECJ gave a ruling on both the free movement of goods and the free movement of capital in case *ED Srl v. Italo Fenocchio*[271] which concerned national legislation on procedure for obtaining summary payment orders. The Court found that a national legislation that prevented recourse to the procedure for obtaining summary payment orders in situations where service on the debtor is to be effected in another Member State, was not contrary to the free movement of goods[272]. This was because – as was the case with *Krantz* – the possibility that there would be an effect on internal trade was too indirect and uncertain. Once again, the question was of whether there would be hesitation by the national traders to sell goods to purchasers that were established

[267] Case 203/80 *Criminal Proceedings against Guerrino Casati* (1981) ECR 2595.
[268] See Barnard 2013, pp. 587–588, cursive by the author.
[269] Case C-630/17 *Anica Milivojevic v. Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen* (2019).
[270] The judgment, paras. 51–56.
[271] Case C-412/97 *ED Srl v. Italo Fenocchio* (1999) ECR I-3874.
[272] The judgment, para. 12.

elsewhere in the EU[273]. Moreover, the national procedural provision did not form a restriction on the freedom to make payments due to its procedural nature[274].

4.4.2 Application of free movement of capital, only

Then again, the Court's case law has identified certain types of national measure, where *only* Article 63 TFEU can apply. In case *Konle*, the Court stated that property purchase and investment are to be seen through movement of capital, and only it[275]. In turn, currency and other financial transactions were demonstrated as solely a capital movement in *Bordessa and others*[276]. Loans[277] have been seen as a mere capital movement, as well as certain kind of investments[278]. From these types of capital movement, property purchase and loans seem to bear the most resemblance to selling arrangements with retention of title as a proprietary security right, even though the property in question in *Konle* was real property, land, and the loan at hand in the applicable case law was granted by a financial institution[279].

4.4.3 On interconnections between Articles of 34 and 63 TFEU

Article 63(1) TFEU prohibits both directly and indirectly discriminatory national measures similarly to Article 34 TFEU. What is even more important, is that the Article also prohibits non-discriminatory national measures which *hinder access to the Member State B's market*.[280]

Cases on indirect discrimination of the free movement of capital include mostly cases concerning tax rules that have a *de facto* discriminative effect on non-residents.[281] For instance,

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[273] The judgment, para. 11.
[274] The judgment, para. 18.
[275] Case C-302/97 *Konle* (1999) ECR I-3099, para 39. Here, the so called "Golden Share" case law becomes relevant; see, for example, case C-483/99 *Commission v. France* (2002) ECR I-4781.
[276] Joined cases C-358/93 and C-416/93 *Bordessa and others* (1995) ECR I-361.
[277] See cases C-478/98 (2000) ECR I-7587 and C-630/17 *Anica Milivojevic* (2019), para. 53. However, see also case C-602/10 SC *Volksbank Romania SA v. Autoritatea Nationala pentru Protectia Consumatorilor – Comisariatul Judetean pentru Protectia Consumatorilor Calarasi* (CJPC) in which the Court stated that the practice of a financial institution to grant a loan constitutes a service in the meaning of Article 56 TFEU (para. 72).
[278] Case C-531/06 (2009) ECR I-4103, paras. 47–48.
[279] See also case C-478/98 *Commission v. Belgium* (Eurobond) (2000) ECR I-7587.
[280] Barnard 2013, p. 590.
[281] See Barnard 2013, p. 590.

in case *Hollman*, Portuguese law entitled the residents of Portugal to lower rate of capital gains tax than non-residents. The Court considered the measure a breach of Article 63(1) TFEU which Portugal could not justify.[282]

The Court has gradually embraced a more substantial form of the obstacle to free movement of capital. Instead of a pure discrimination or even indirect inequality, the ECJ has found national measures that "create and obstacle" or "restrict" capital movements enough to satisfy the prohibition in Article 63(1). For example, in *Commission v. Portugal*, the Court stated that even measures that do not, as themselves, cause unequal treatment, but which however make it less favorable for foreign investors to engage in investing capital in undertakings situated in the host Member State, are included in the scope of Article 63(1) TFEU[283]. Nevertheless, similarly to free movement of goods, if there is no substantial impediment, Article 63(1) TFEU has not been breached.[284] A quite similar reasoning was present in cases *Lenz*[285]and *Commission v. France*, in which the Court stated that measures which create obstacles or otherwise make it less attractive for nationals of other Member States to exercise free movement of capital and establishment, were prohibited by Article 63(1) TFEU[286].

The mentioned approach by the Court sounds rather similar to the language used with regard to Article 34 TFEU and the *market access* test. The *market access* approach of other market freedoms' case law has indeed been followed in the field of capital in the *Golden Share* judgments.[287] An example of this is case *Commission v. UK* in which the Court held that non-discriminatory measures hindering access to the market were in breach with free movement of capital[288]. The Court found it not relevant that the national rules applied equally to residents and non-residents, but that they nevertheless "were liable to deter investors from other Member States from making such investments and, consequently, affect access to the market"[289].

[282] Case C-443/06 *Hollmann v. Fazenda Pública* (2007) ECR I-8491, para. 36. See also case E-2/06 (2007) *EFTA Court Reps. 164*, in which the EFTA Court found the national measure of Norway to be indirectly discriminative. Norway was however able to justify the measure, but it was found to be not proportionate.
[283] See Case C-367/98 (2002) *Commission v. Portugal* ECR I-4731.
[284] Barnard 2013, pp. 592–593.
[285] Case C-315/02 *Lenz v. Finanzlandesdirektion für Tirol* (2004) ECR I-7063, para 21.
[286] Case C-483/99 *Commission v. France* (2002) ECR I-4781, para 41.
[287] See Connor 2012, pp. 708–709.
[288] Case C-98/01 Commission v. UK (2003) ECR I-4641.
[289] The judgment, para. 47.

What is significant to note here, is that the ECJ has argued with a kind of "*de minimis*" rule also in the field of capital movements. Namely, in case *Graf*, the Court developed a rule known as "too uncertain and indirect". When this rule applied, there would be no breach of Article 63(1) TFEU.[290]This judgment will be elaborated in more detail in chapter 5.

This approach – *market access* together with some institutional support for a possible *de minimis* threshold – means a close link between the two freedoms. If *market access* test can be applied to both free movement of goods *and* capital, searching for an applicable *de minimis* threshold from the Court's case law on the test bears significance not only for the question of possible breach of Article 34, but also on what the threshold could be with Article 63(1).

Moreover, numerous scholars have acknowledged that the principles and tests that are applicable to some internal market freedom, have pretty much converged since the 1990's. *Cruz* has approached the free movement provisions as a whole. He argues that the ECJ has been trying to establish a uniform interpretation of the rules concerning free movement.[291] According to *Cruz*, everything implies that it should be possible to adopt a single test and even a single free movement norm.[292] He states that since the consequences of different free movement provisions are almost identical, it is increasingly irrelevant to classify situations as belonging to just one of the four freedoms[293]. I do not believe in the possibility of a single norm, but a single test, namely *market access*, would not be a far-fetched option in the light of the current EU law.

According to *Mortelmans*, it is apparent in the light of the Court's case law that there is a clear direction towards convergence in the tests and principles governing the freedoms. The existing differences between the interpretation and application of the freedoms are partly due to the fact that the Court has not had an opportunity to extend its case law.[294] The ECJ has even explicitly acknowledged the converging possibility between the free movement of capital and the free movement of services and establishment. *Verkooijen*[295] was an interesting decision in that even though the case concerned the current Article 63 TFEU, the Court made references to its case

[290] See case C-190/98 *Graf v. Filzmozer Maschinenbau GmbH* (2000) ECR I-493.
[291] Cruz 2002, p. 92. On extensive interpretation of provisions of law, see Rotoro – Roversi 2013, pp. 186–187.
[292] Cruz 2002, pp. 94–95. According to this potential rule, "all restrictions on the free movement of economic factors" should be prohibited within the Member States.
[293] Cruz 2002, p. 96.
[294] Mortelmans 2001, p. 618.
[295] Case C-35/98 *Verkooijen* (2000) ECR I-4071.

law on the freedom of establishment and the free movement of services. In *Futura*,[296]the Court supported a case with the free movement of services with its case law on the free movement of goods and the freedoms of establishment.[297]

Even though the convergence may not be perfect and it is still unclear how for example *Keck* and *Trailers* would apply to free movement of capital, there are grounds for justification of the converging trend. For example, *Jansson* and *Kalimo* have pointed out the difficulty in differentiating goods from services in practice. They further state that application of a more generic approach to EU internal market law would have positive effects on legal certainty. However, the *de minimis* tests may not always be identical, and therefore context-specific analysis has to be taken into account.[298]

4.4.4 Change in the substance area – analogy from investments and tax case law to proprietary security rights?

On the other hand, an important question arises: how much analogy could reasonably be drawn from case law on foreign investments and tax treatment to the field of movable proprietary security rights?[299] Albeit this is not an easy question, some similarities can be found. As *Kieninger* has argued, non-recognition and non-enforcement of foreign retention of title clauses can substantially hinder the seller from carrying out his business in a profitable way in the Member State in question. It can work as an obstacle for him to extend his business in this Member State or even lead him to stop trading there altogether. This argumentation resembles the manner in which the Court has reasoned its judgments concerning investments – good

[296] Case C-250/95 *Futura* (1997) ECR I-2471.

[297] See Mortelmans 2001, p. 619. These converging judgments are examples of the Court's broad discretion in answering the preliminary questions. The ECJ has discretion to examine issues and questions that have not been asked specifically by the national court. It may also recast the questions before it. Based on the Court's assessment on whether it regards it as helpful to the national court to decide the case, the Court may also rule on the interpretation of an EU measure that has not been included in the preliminary reference. See Tridimas 2015, p, 408, and case C-583/14 *Nagy* (2015) ECR I-737, where the Court extended a case originally about Articles 18 and 20 TFEU to concern the free movement of capital (paras. 19–23). Here, the Court ended up stating that such national legislation is contrary to Article 63 TFEU which sets the requirement that only vehicles that have an administrative permission by the local authorities, are allowed to be moved in the national transportation system (para. 37).

[298] Jansson – Kalimo 2014, pp. 528–529.

[299] A recent judgment concerning tax treatment and the free movement of capital is case C-6/16 *Enka SA v. des Finances et des Comptes publics* (2017) ECR I-641.

examples of this are cases *Commision v. UK, Commission v. France* and *Commission v. Portugal* mentioned above.

When it comes to taxation, the ECJ concluded in *Sandoz*[300] that a mere imposition of a stamp duty of 0,8 percent on loans from other Member States as well as domestic loans constituted a restriction on the free movement of capital even though the national measure in question did not amount to discrimination.[301] This was because, according to the Court, this prevented "residents from benefiting from the absence of taxation" which might take place with loans "imported" from elsewhere, and was therefore "likely to deter such residents from obtaining loans from persons established in other Member States"[302]. The way I see it, there is potential for analogy from the argument of absence of taxation to the absence of provisional requirements concerning third-party effectiveness of a retention of title clause.

What is more, Article 63 TFEU has often been considered breached when a State has set special authorization requirements for foreign investors[303]. This can be compared to the non-recognition of foreign retention of title clauses as a result of the host state having set special preconditions for a valid security right against third parties which the foreign seller has not fulfilled.

4.5 Conclusions and application to the case "*Y GmbH vs. Finland*"

It seems that the free movement of goods as a fundamental freedom of the internal market may offer a somewhat better protection for different proprietary rights than free movement of capital. When free movement of goods is concerned, the ECJ's argumentation in *Trailers* and subsequent case law leads the way with the most feasible means to include proprietary security rights within the scope of Article 34 TFEU. This is since the *market access* test can be seen to hold a lot broader set of national means than its previous competitors, the *Dassonville* formula and *Keck* doctrine. What is significant, is that the ECJ has also applied the *market access* test to Article 63(1). Therefore, there are valid grounds to extend the use of the *market access* test from the field of goods to capital movements, at least when done carefully. This will have significant

[300] Case C-439/97 *Sandoz* (1999) ECR I-7041.
[301] See Snell 2007, p. 345.
[302] Case C-439/97 Sandoz (1999) ECR I-7041, para. 19.
[303] See for example Case C-531/06 *Commission v. Italy (pharmacists)* (2009) ECR I-4103, para. 40.

consequences for to the next chapter, where different thresholds of the *market access* approach will be elaborated with regard to the national treatment of foreign retention of title clauses.

In case "*Y GmbH v. Finland*", Y GmbH can invoke and rely on both Articles 34 and 63 TFEU as they have both been shown by the ECJ to be directly effective. It is also important that there is not only doctrinal, but also institutional support for including proprietary security rights into the scope of Article 63 TFEU. However, there seem to be slightly stronger grounds for Article 34 to include the treatment of foreign retention of title clauses than Article 63 TFEU[304]. One of these reasons is that the latter Article has generally been invoked *only together with another* provision of EU law, as solely capital movements have usually concerned clearly financial transactions between a professional financial institution and a company. Retention of title transactions seem to lack this "sophistication" to be deemed only in light of Article 63 TFEU. Therefore, I consider it a well-founded opinion that, in case a scenario similar to my practice case came before the ECJ, the Court would argue its ruling with both Articles. The question of which Article could actually "succeed", will be more closely investigated in chapter 6.

[304] See, for example, Juutilainen 2015, p. 93–94.

PART II

"If the market access approach comes with such a threshold, the arguments presented in the aftermath of Krantz - - then support the view that the threshold may be met in the case of treatment of foreign proprietary security rights."[305]

5. *DE MINIMIS* IN THE LAW OF CAPITAL – A PRINCIPLE OF INTERDISCIPLINARY VALUE?

5.1 The principle of *de minimis* from EU competition law to EU internal market law?

De minimis is a solid principle in EU competition law. Can the borders between different fields of EU law be flexible in a way that this principle could have significance in free movement freedoms? *Juutilainen* has noted that it is an open question if the *market access* approach includes a threshold of application and what this threshold would exactly be[306]. I will, indeed, examine the question of whether the principle of *de minimis* could be transferable to the field of EU free movement law. Even though the Court has stated that the principle does not exceed to the area of internal market freedoms[307], the Court's jurisprudence on *market access* leaves a lot to be questioned. I will bring forward the many instances in which the Court has used a similar language compared to a *de minimis* test. In these cases, existence of a certain *de minimis* threshold seems to be present, regardless of whether the Court admits this or not.

The ECJ has not set a *de minimis* rule on Articles 34 or 63 TFEU. On the other hand, the Court has confirmed that, for an existence of a MEE, a mere hypothetical or causally indirect – ambiguous or remote – possibility to hinder import is not enough[308]. Could it be that there is an implicit threshold – a kind of *de minimis* – in the *market access* test? According to *Frenz*, who has a highlighted competition law perspective, there is no *de minimis* threshold in fundamental

[305] Juutilainen 2015, p. 92.
[306] Juutilainen 2015, p. 92.
[307] Joined cases 177/82 and 178/82 *Van den Haar* (1984) ECR I-I-1797; See also Mortelmans 2001, p. 633.
[308] See for example case C-69/88 *Krantz*.

freedoms, since even measures that only restrict the market in a minimal way or even theoretically, are in the ambit of the Articles. [309]

Akkermans and *Ramaekers* acknowledge the possibility that there could be a preliminary *de minimis* test hiding in the logic of the *market access* test. According to them, the second test for certain selling arrangements – whether it has effects on market access – includes evaluation of whether it *substantially* hinders access to the market of Member State B. In this regard, they point out that even though the Court has traditionally denied having a *de minimis* requirement in connection with internal market freedoms, there would be no point in the *market access* test, if it did not contain any threshold as this would lead to the scope of market hindering-measures being overly broad.[310] *Spaventa,* has also stated that there has always been a tendency to qualify the *market access* test as having a threshold of application, below which national provisions or other measures would not need justification, but would as itself be outside the scope of Article 34 TFEU – much the same way as in EU competition law. This threshold would either be called *de minimis* or "substantial hindrance" to market access.[311]

AG *Jacobs* has suggested criteria for a threshold in his opinion of *Leclerc-Siplec*[312]. He had very similar argument with *Akkermans* and *Ramaekers* in that pure application of the *market access* test would potentially capture the amount of national measures that is too wide. As a consequence, he went on to suggest a criteria that when the measure restricts access to the market "substantially", it belongs to the ambit of Article 34 TFEU and requires justification by the Member State in question.[313]

The ECJ held in its famous *Trailers* case that "a prohibition on the use of a product - - has a *considerable* influence on the behavior of consumers, which, in its turn, affects the access of that product to the market of that Member State."[314] The reasoning very much sounds like acknowledging a threshold in the test. *Barnard* has discussed how to put together the clear use of a threshold and the Court's older case law which shows a clear reluctance to acknowledge that there is a *de minimis* threshold in free movement of goods. She suggests that there might

[309] Frenz 2016, p. 58.
[310] Akkermans – Ramaekers 2012, p. 8.
[311] Spaventa 2009a, p. 923.
[312] Case C-412/93 Leclerc-Siplec v. TFI Publicité SA (1995) ECR I-179.
[313] The opinion, paras. 41, 49.
[314] Case C-110/05 Trailers, para. 56.

indeed not have been a threshold in distinctly applicable measures and cases concerning product requirements, i.e. the cases following the *Cassis* judgment. Instead, the threshold criteria was established when the *market access* test was introduced.[315]

Actually, AG *Van Gerven* already suggested application of a concrete test in 1989 in *Torfaen*[316] concerning the free movement of goods. He stated that in case the national measure "merely increases the difficulty in penetrating the national market", the free movement of goods can be applied only when it "appears from the entire economic and legal context that the economic interweaving of national markets sought by the Treaty is thereby threatened[317]". Even though the ECJ did not incorporate *Van Gerven*'s ideas into its decisions in either *Torfaen* or *Keck*, the approach left an academical mark. Some, such as *Mortelmans*, have however criticized the approach of being too broad[318].

The *de minimis* test has been a success in competition law, which speaks for that it might have advantages also in the area of free movement.[319] There are valid grounds for convergence between these two fields of EU economic law. One of these grounds is to ensure that EU law functions effectively.[320]Furthermore, competition and free movement rules are based on the same objectives, to facilitate the proper functioning of the trade and economy within the EU.[321] On the other hand, the converging trend of *de minimis* has been criticized and it has been stated that the ECJ should still refrain from using the *de minimis* tests or at least reject this use. The problem with the test is that it would be challenging to apply in practice and there is risk for the rulings to become intuitive, which in turn would be a threat to legal certainty.[322] All in all, there can be distinguished three categories of *de minimis* thresholds used by the Court. They all have the same aim, to exclude those measures outside application of the Articles that do not have the "substantial" effect required. The three tests are sometimes difficult to differentiate from each other, but certain characteristics can be found.[323]

[315] Barnard 2013, pp. 106–107.
[316] Case C-145/88 *Torfaen* (1989) ECR 3851.
[317] The opinion, para. 22.
[318] Mortelmans 2001, p. 626.
[319] Jansson – Kalimo 2014, p. 540.
[320] Cruz 2002, p. 105.
[321] Mortelmans 2001, p. 620; Cruz 2002, pp. 100–101.
[322] See Weatherill 2012, pp. 542 – 543.
[323] Jansson – Kalimo 2014, pp. 527–528.

5.2 Magnitude *de minimis*: the restriction is not severe enough

Magnitude may be the most common form of *de minimis* tests. It means a negligible restrictive effect, the *substantial* hindrance to internal market.[324] The magnitude of a measure can even be seen from the language that the Court has used. For instance, there is a *prima facie* obstacle, if investments are "deterred"[325] or "discouraged" [326]. The ECJ has expressly stated that there is no *de minimis* test concerning the magnitude of the restriction in the free movement law. However, this is mainly because the Court's case law was previously focused on discrimination cases.[327]

The magnitude of the restrictive effect can be seen in three instances. First, it can refer to the size of the market that has been restricted. This test therefore permits those measures which have effects only to local markets or that only affect a limited number of goods or traders. On the other hand, the ECJ has been quite inconsistent here as it has stated in *Ditley Bluhme*[328] that there can still be a prima facie prohibited measure even if it only affects minimal part of the EU market[329]. The second magnitude test can be called market share *de minimis*: if there is restriction on a substantial part of the relevant market[330]. Then again, the third instance of magnitude can be seen as the individual effect *de minimis*: the effect on individual traders is small[331]. Nevertheless, the "smallness" would be questionable as the threshold would be set in accordance with the highest restrictive effect proven among the individual traders.[332]

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[324] Nevertheless, some have suggested that the threshold could be even as high as close to 100 %: an almost complete block to trade. See Jansson – Kalimo 2014, p. 531.

[325] Case C-98/01 *Commission v. United Kingdom* (*BAA*) (2003) ECR I-4641, para 47.

[326] Joined cases C-282 & 283/04 *Commission v. Netherlands* (*KPN and TPG*) (2006), ECR I-9141, para 28.

[327] See Joined cases C-277/91, C-318/91 and C-319/91 paras. 35 and 37 and Joined cases 52 and 55/65 *Germany v. Commission* (1966) ECR 159. See also Vogel 2015, pp. 53–54; Jansson – Kalimo 2014, p. 530. There are still examples where the Court has denied the existence of a *de minimis* test, even though there was no discrimination in the case. See Case C-166/03 *Commission v. French Republic* (Gold Alloy) (2004) ECR I-6535, para 15. and Joined cases 177 and 178/82 *Jan van de Haar and Kaveka de Meern* BV (1984) ECR I-1798, para. 13, in which the Court held that a national measure must be considered a MEE "even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways."

[328] Case C-67/97 *Criminal proceedings against Ditley Bluhme* (1998) ECR I-8033.

[329] The judgment, para. 20.

[330] See Jansson – Kalimo 2014, p. 532. This test is significant in EU competition law, where *de minimis* means that sufficiently small restrictions on competition (quantified by market percentages) are not prohibited. Between actual or potential competitors, the market share threshold of the parties to the agreement is 10 % on any of the relevant markets that are being affected by the agreement. See for example Frenz 2016, pp. 57–58, 297; Commission *de minimis* notice, pp. 1–2.

[331] See joined cases C-177 and 178/82, preliminary question no. 2.

[332] Jansson – Kalimo 2014, pp. 532 – 533.

Transposed to the field of free movement freedoms and proprietary security rights – and in particular, retention of title clauses – the magnitude tests could mean that a restriction which only affects the use of a retention of title between the respective Member State and one another country would be permitted. This would fulfill at least two of the tests above. First, the effect would probably only affect those traders that use retention of title clauses, and namely their extended versions. Second, only a relative share of the EU-wide relevant market – the trade with certain kind of objects, such as machines used in sawmill industry – would be affected because not all of this trade takes place between the two Member States in question.

Of course, this is a question of how the relevant markets are defined: if the relevant market is narrow, restriction of a magnitude effect is more likely to take place. In competition law, relevant markets are divided into geographical and product markets. Product market is defined by the products that are interchangeable with one another, whereas geographical market concerns the issue of where, for example between which Member States, the interchangeable products are marketed. Interchangeability is detected by a 5–10 % increase in price – if this increase makes the buyer favor the seller's more inexpensive competitor with sufficiently similar product, the products are on the same market. When it comes to demand for specialized products, such as those used in sawmill industry, the market may be narrow.[333]

Moreover, it is questionable whether the effects on individual traders would be small – this would at least be contrary to what *Rutgers*, *Kieninger* and *Roth* have argued. On the other hand, as *Juutilainen* has stated, no one forces German traders to use extended clauses. The foreign trader could – at least in theory – perfectly well be satisfied to use simple clauses. Then again, if it is the economic function of the extended clause that he is dependent on, he could choose some other form of pledge that fulfills this function and is at least *transposable* in other States.

It is an open question whether the three magnitude sub-tests are cumulative or whether only one of them is enough to make the national measure not prohibited.[334] I cannot state for certain whether the situation in my practice case could fit in all the magnitude tests because of the possible narrowness of the relevant market and the effect on an individual trader. In case the markets were defined in a wider sense and the effect on an individual buyer were seen minimal,

[333] Frenz 2016, pp. 670–677.
[334] Jansson – Kalimo 2014, p. 534.

the situation would remain under the magnitude-related *de minimis* threshold and not be *prima facie* prohibited. On the other hand, in case of wider markets and not minimal effects on traders, the cumulative application of the tests would fail and the magnitude *de minimis* would not apply. What is more, the result of a non-recognition policy could potentially have severe consequences so that the effects would not be limited to only one other Member State. This could also make the effect's magnitude far from minimal, and hence, the restrictive measure itself prohibited.

All in all, the magnitude test with its three sub-tests and profound technical nature derived from competition law is rather difficult to transfer to the area of state-imposed practice that *might* have restrictive effects on internal trade. Consequently, I will next examine the two better-suited tests: causality- and probability-based *de minimis* thresholds.

5.3 Causality-based *de minimis*: the effects are too remote

5.3.1 Cases falling "on the perimeter" of Article 34 TFEU

Even though there was originally no *de minimis* threshold in connection to Article 34 – or 63 – TFEU, the ECJ seems to have done exceptions in its case law even before the era of the *market access* test. These exceptions, namely use of a remoteness test, were applied to cases which fall far from the obvious application schemes of the free movement Articles and which do not exactly deal with traditional trading rules.[335] The causality-based threshold includes also cases that do not deal with trading rules in the narrow sense of the term[336]. Treatment of foreign proprietary security rights clearly seems to belong to this category.

Another example of cases falling on the perimeter of free movement of goods law is patents. AG *La Pergola* suggested a *de minimis* test in his opinion in BASF.[337] There, he restates the "too uncertain and indirect" rule that had already been used in *Krantz*. After that, he goes on to explain the causality-based *de minimis* rule: "- - the object of the principle recalled here, laid down in the *Dassonville* judgment, is always to verify whether a causal link exists — it does not

[335] Barnard 2013, p. 80.
[336] Spaventa 2009b, pp. 252–253. See also Barnard 2013, p. 80.
[337] Case C-447/98 *BASF* (1999) ECR I-6269.

in this particular case — between the national measure concerned and the pattern of imports." *La Pergola* then states the fact that (the current) Article 34 TFEU does not, at least explicitly, include a *de minimis* rule. Because of this, he states, all the Article requires is an obstacle to trade, even if it is a minor one. Nevertheless, for there to be even a minimal obstacle, there needs to be a causal link.[338] On the other hand, if a direct causality is found between the measure and the effects on *market access*, there is evidence of a *prima facie* restriction on free movement[339].

Jansson and *Kalimo* have questioned the applicability of the criteria of direct causality to national measures that prohibit optimal means of advertising. This kind of measure could fall under the causality threshold even though it would most certainly have effects on business performance. If the measure were assessed only through causality and directness of the effects, it could remain permissible even though its magnitude and probability could still be high.[340]

AG *Tesauro* has elaborated the requirements for directness and unhypotheticality of the effects on internal market in his opinion to case *Hünermund*[341]. The national measure in question was a marketing arrangement for products, whose effects on imports and demand were hypothetical and indirect and did not thus trigger the *market access* test.[342]According to *Tesauro*, Article 34 TFEU was to be interpreted as not prohibiting "pharmacists from advertising quasi-pharmaceutical products outside the pharmacy[343]" as the advertising arrangement did not have direct connection with imports and was not able to hinder internal trade.[344]

This is a problem that would touch the area of proprietary security rights and even retention of title, as they have even been defined as selling and marketing arrangements by *Kieninger* and *Rutgers.* On the other hand, there is a possibility that this is not what "directness" actually means

[338] The opinion, para. 18.
[339] Jansson – Kalimo 2014, p. 543.
[340] Jansson – Kalimo 2014, pp. 543–544.
[341] Opinion of AG Tesauro in Case C-292/92 *Ruth Hünermund and others v. Landesapothekerkammer Baden-Württenberg* (1993) ECR I-6787, paras. 22, 25.
[342] The opinion, paras. 22, 25, 31.
[343] The opinion, para. 32.
[344] The opinion, paras. 20 and 28. See also opinion of AG Tesauro in Case C-368/95 *Vereinigte Familiapres Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* (1997) ECR I-3689, where he maintained that the (current) Article 34 TFEU does not include measures that are "absolutely general in nature", which apply without indistinctly to both ddomestic and imported products, which do not negatively affect imports and which "might lead at most to a hypothetical reduction in the volume of imports only as a consequence of an equally hypothetical reduction in the overall volume of sales" (para. 10).

– it could be that a measure could be seen as "direct" for the mere reason that it prevents market access, even if this takes place gradually over time.[345]

5.3.2 Could the threshold be seen as the amount of "*if*"-scenarios? *Krantz* revisited

Krantz, one of the most important cases with regard to my topic, was given long before the ECJ had given its leading case *Trailers* concerning the *market access* test in free movement of goods. Here, the Court seemed to apply both the probability test and the causality-based *de minimis* test. As was stated previously, the Dutch provision in question was deemed "too uncertain and indirect", and the substantial question itself was kind of dismissed. [346] Indeed, *Krantz* was the first case in which the doctrine of "effect too uncertain and indirect" was mentioned[347].

However, a slightly different and a lot more insightful interpretation can be drawn from AG *Darmon*'s opinion in *Krantz*. Even though the Court ended up with the same conclusion in *Krantz*, the path was different. *Darmon* begins by explaining a possible way of reasoning. First, it needs to be explored whether there are "perceptible effects on imports"[348]. I choose to call this inquiry the first test. Second, focus needs to be directed at the national provisions that result in these effects: do they reflect a legitimate objective or are the effects disproportionate? I shall call this the second test. Nevertheless, he points out, this investigation presupposes answering the question of whether there indeed are "perceptible effects on imports" (the first test). In his opinion, the situation in *Krantz*, or more specifically the Netherlands legislation in question, lacks the sufficient effects.[349] In other words, the circumstances in *Krantz* fail the first test.

Darmon's main thesis is that there are simply too many "if"-scenarios taking place for the national legislation to be taken to the second test. This is why the second test – investigation of the compatibility of the national provisions with the effects on internal market – is not needed.

[345] Jansson – Kalimo 2014, pp. 543–544.
[346] See Barnard 2013, p. 122.
[347] Spaventa 2009b, p. 250.
[348] The opinion in case C-69/88 *Krantz*, para. 11.
[349] Opinion of Advocate *General Darmon*, para. 11.

He concludes this saying that "the compatibility of the national measure with Article 30 (now 34) is shown quite simply by the absence of any bearing on imports"[350].

Darmon goes on to explain his conclusion. First, the scope of the national provision is limited so that does not include stocks. According to *Darmon*, this is a factor that speaks for the idea that the national legislation is not meant to cover situations with internal market.[351] Second, he points out that the Netherlands law "has no effect on the volume of demand from buyers on instalment terms". With this, he refers to retention of title clauses. *Darmon* considers the only possible effect for imports to be the negative impact on foreign sellers who use instalment terms and might therefore hesitate to enter into an agreement with a buyer who is subject to the direct taxation system of the Netherlands.[352]

After this, *Darmon* emphasizes that the lastly mentioned possible reluctance is of "merely hypothetical character".[353] This is the first "if": foreign sellers might establish means to cover their increased risk and costs[354]. Moreover, he continues, such reluctance is only relatable to the materialization of an event that is uncertain.[355] This is the uncertainty of the event. The second and third "if" can be seen to form from the way *Darmon* further divides this uncertainty. He explains two accounts on which this shows. First, – the second "if" – is the fact that the risk of seizure by Netherlands tax authorities concerning objects sold on instalment terms to a Netherlands buyer actualizes *only* when the debtor defaults his direct tax debts. Second option in which the uncertainty of the event actualizes – the third "if" – is if the competent national authorities make the decision to solve the situation and both domestic sellers and sellers from other Member States are treated equally.[356] There cannot be a measure of equivalent effect, if there is no effect to start with.[357]

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[350] *Ibid.*
[351] The opinion, para. 12.
[352] *Ibid*.
[353] The opinion, para. 12.
[354] See *Kieninger* 1996b, pp. 56, 60–62.
[355] The opinion, para. 12.
[356] *Ibid*.
[357] The opinion, para. 17. It is interesting to note that AG *Darmon*'s opinion in *Krantz* with its if-argumentation may have influenced AG *Tesauro* to reason his above discussed opinions in *Hünermund* and *Familiapress* the way he did a few years later. There are indeed some obvious similarities in argumentation even though *Krantz* did not concern selling or marketing arrangements. For example, AG *Tesauro* found that the situation in *Hünermund* involved a two-level hypothetical scenario with the measure's hypothetical possibility/effect to reduce imports due

What is even more considerable in the opinion, is *Darmon*'s reasoning at the end. Indeed, he continues by saying: "That conclusion might perhaps have required reconsideration if - - [the national legislation] had also applied to stocks, since the possibility of effects on trade arising out of a greater degree of 'reluctance' could not then have been ruled out".[358]

Finally, *Darmon* elaborates the possibility for a national provision to be of such nature that it could potentially give rise to effects on imports, but that it might still not produce these effects in the circumstances at hand. It cannot be known *a priori* whether abolition of certain national measures might eventually enable imports to increase. [359] He concludes this idea by stating that the Court's case law gives rise to the possibility that in certain circumstances legislation can be considered to not have influence on imports, when that legislation actually bears *some* effects ("is not totally without effects"). The same interpretation has to be extended to measures, the restrictive effect of which, be it actual or potential, merely happens to be undetectable.[360]

Does the end of the opinion mean that there could have been these "undetectable" effects on imports in *Krantz*? At least, it can be drawn from *Darmon*'s reasoning that were there less "if-scenarios" in the case, the outcome could have been different. It is not sure, however, how many uncertainties should have been removed for the threshold of Article 34 TFEU to be applicable.

It has been argued that the reasoning by AG *Darmon* gives rise to further questions: if the seller-creditor in Germany, for instance, cannot rely on retention of title as a feasible practice and therefore demands a more expensive security, would this then constitute "discernible restriction to trade"? The seller might have been able to sell his products at a lower cost, which is now watered down and hence, the possible competitive advantage is lost.[361] I would carefully assume the answer to likely be no, since there would still be much uncertainty. For example, the question of losing a competitive edge would be difficult to show, and the situation would still face the same risk of being of hypothetical character.[362]

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to its equally hypothetical possibility to reduce sales (the opinion, para. 28). He later confirmed this two-level test in *Familiapress* (para. 10), although it did not apply to the national measure in the case (paras. 11–12).

[358] The opinion in *Krantz*, para. 13.

[359] The opinion in *Krantz*, para. 14.

[360] *Ibid*.

[361] Akkermans – Ramaekers 2012, p. 16.

[362] See Davies, pp. 674 – 684.

Some scholars believe that in a broader setting than in *Krantz*, the Court could likely give its interpretation on the treatment of foreign proprietary security rights. *Akkermans* and *Ramaekers* believe that in a broader context the Dutch legislation might in fact constitute a trade barrier: while foreign sellers would be compelled to use more costly security rights, such as a letter of credit, domestic creditors would not have this need.[363] They further believe that a case with circumstances resembling *Krantz* is bound to encounter the ECJ soon enough, in which situation Article 34 TFEU would be applicable. According to them, the Member State in question would probably not be able to justify the measure and succeed the proportionality test.[364]

However, the question remains, has the ECJ not dealt with other cases concerning proprietary security rights after *Krantz*? They propose a few possible answers. One possibility, according to *Akkermans* and *Ramaekers*, is that most Member States recognize a quite similar set of property rights – *numerus clausus* – at least when it comes to their purpose. The third option is that parties could choose an international form of security in expensive cross-border business.[365]

Second option is that, as the Court was so overly cautious in *Krantz* and since there is very little European activity in this area, the ECJ would refrain from putting itself in a situation where it has to make this fundamental decision.[366] Second possibility, in turn, for the lack of case law could be *Krantz* working as *acte clairé*: a previous ruling on a matter makes it unnecessary for a national court – even the court of highest instance – to seek a preliminary ruling on the same matter.[367] However, it is to be noted that following a previous precedent does not equal to using analogy. Whereas analogical reasoning consists of finding similarities between different circumstances, the supposed obligation to follow an earlier precedent may flat out cease the possibility to assess the new circumstances in new light, particularly if the previous decision was given a long time ago. The law evolves and old precedents can be overruled[368].

In fact, the ECJ does not adhere strictly to the doctrine of binding precedent (*stare decisisis*), even though it has overruled a previous precedent only few times. Overruling has taken place

[363] Akkermans – Ramaekers 2012, pp. 16–17.
[364] Akkermans – Ramaekers 2012, p. 11–12, 17, 20.
[365] Akkermans – Ramaekers 2012, p. 20–21.
[366] Akkermans 2008, p. 545.
[367] For *acte clair*, see cases C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (1982) ECR I-3415, para 14. For recent case law, see case C-3/16 *Lucio Aquino v. Belgische Staat* (2017) ECR I-209.
[368] See Schauer 2013, pp. 49–52 and Beck 2012, pp. 182–183.

when the previous interpretation has been with error, when the earlier precedent did not work or when the overall evolution of the EU has made the ruling unfit to the EU's present state. *Keck* is a good example of unworkability, since the division of measures into two separate categories introduced by it did not clarify the notion of a MEE, but actually made the contrary[369]. It is possible that the evolution of the EU law and a later discovery of a previous and erroneous interpretation would result in an overruling of *Krantz.*[370]

5.4 Probability *de minimis*: the effects are too hypothetical

The probability is quite close to the causality test in that the both deal with "too uncertain" national measures. However, probability threshold is more focused on the degree of hypotheticality of the possible effects than their remoteness[371]. In other words, causality-based threshold tackles measures which might well have effects on internal trade, but the effects are too indirect, while the probability threshold focuses on perhaps non-existent measures.[372]

In a *de minimis* test based on probability, the Court assesses whether the restrictive effect which is caused by the national measure is too uncertain[373]. Sometimes an additional test, a "hypothetical event test" has to be taken as well, since the (uncertain) effect may be subject to a circumstance or an event that itself is uncertain.[374] *Krantz* is a good example of this kind of reasoning. The effects on internal market were dependent on whether traders in other Member States would refrain – hypothetical assumption, to start with – from selling to Dutch buyers due to the, as itself, hypothetical possibility that, first, the buyer would be a defaulting tax debtor and second, the seller's products would become subject to seizure by the tax authorities.

[369] See Head 2015, p. 36.
[370] Tridimas 2012, pp. 307, 323–325.
[371] See case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e. V. v. Yves Rocher GmbH* (1993) ECR I-02361, paras. 21–22.
[372] Jansson – Kalimo 2014, p. 541 and 544.
[373] See case case C-299/95 *Friedrich Kremzov v. Republic of Austria* (1997) ECR I-2637, paras. 16, 18–19, where the Court found that a mere hypothetical possibility for a person to use his free movement is not sufficient to establish a connection with EU law. Hence, the provisions on the free movement of persons were not applicable.
[374] Jansson – Kalimo 2014, p. 546.

In *Graf*[375], the Court applied the hypothetical event test and thus made Article 63 TFEU inapplicable to the national provision in question. The case concerned an Austrian legislation according to which workers did not have right to compensation upon termination of employment if the worker himself ended the contract. According to the Court, the possibility that a contract could be terminated by reasons "not attributable to him" – as there would be compensation then – was not probable enough for the legislation to form a prohibited obstacle[376].

However, there are cases in which the Court has not applied the hypothetical event test even though the event has been hypothetical. *KPN and TPG*[377] concerned the free movement of capital and the "golden shares" that would give the government special shareholder rights to veto even economically proper decisions. The ECJ ended up finding even *the risk* of the government's use of its veto rights *sufficient* for an restriction to free movement of capital as it discouraged investors[378]. Hence, the threshold was met, despite its clear hypotheticality.[379]

The outcome of *KPN and TPG* is interesting, since the Court could have chosen the approach it had embraced in *Krantz* and *Graf* – that the possible difficulties encountered by third persons when they tried to acquire shares was dependent on the hypothetical event that the government might use its veto right[380]. I cannot help seeing the logic of AG *Darmon* in the Court's decision to favor cross-border investments in this case. *Darmon* indeed stated in *Krantz* that had the Dutch provision applied to stocks as well, it would probably have succeeded to the second test, i.e. to the actual assessment of the measure's effects on internal trade. This might pave the way for the treatment of foreign retention of title clauses to be included in the free movement of capital – with the significant precondition that the rights derived from these devices were first characterized as a capital movement.

[375] Case C-190/98 *Volker Graf v. Filzmoser Maschinenbau GmbH* (2000) ECR 493.
[376] Case *Graf*, paras. 24–25. See also Barnard 2013, pp. 146–147 and Jansson – Kalimo 2014, pp. 546–547.
[377] Joined cases C-282 & 283/04 *Commission v. Netherlands* (*KPN and TPG*) (2006) ECR I-9141.
[378] Case *KPN and TPG*, paras 20–28.
[379] Vogel 2015, p. 269. See also this thesis, pp. 57–58.
[380] Jansson – Kalimo 2014, p. 547.

PART III

"As private international law is a field heavily dominated by legal theory in such a way that theory rather than legislation is considered guiding for the resolution of conflict of law situations, a change in theory should be viewed as a change in legislation."[381]

6. TO BE OR NOT TO BE: THE SEARCH FOR A CONCRETE THRESHOLD IN THE FICTIONAL CASE

It was concluded in the part II of this thesis that the *market acccess* test can indeed be seen to have certain thresholds of application. However, the question is whether the restriction to free movement of goods/capital brought about by non-recognition and non-enforcement of a foreign retention of title clause exceeds this thresholds or not. If it does exceed the threshold, it could constitute an infringement to internal market. As was shown previously in this thesis, the ECJ has defined the threshold as being relatively high. Therefore, if the situation in my case "*Y GmbH vs. Finland*" stays under the threshold, it cannot be seen to significantly hinder competition or marketing practices between companies in the internal market. Consequently, the Finnish national treatment undergoes a *de minimis* test. Next step is to test whether the effect on internal market is only minimal so that it merely reduces trade or whether it is severe enough so that it has a *genuine* effect on *market access*. Here, the question is: what is *severe enough* a restriction? To be able to answer this, a *de minimis* threshold has to be defined in this context. If the threshold is met with the free movement of capital, there is a *prima facie* infringement of Article 63(1) TFEU. The same goes with Article 34 TFEU and the free movement of goods.

Here, two ideas become significant. The first is Advocate General *Darmon*'s opinion in *Krantz*. I have previously proposed a method in this thesis that the threshold could be connected to the amount of uncertainty present in the factual circumstances and how much of the outcome is up to chance. In *Krantz*, the amount of uncertainty was seen to be as too dominant for either AG *Darmon* himself or the ECJ to even take the case to second test which would have determined

[381] Akkermans – Ramaekers 2012, p. 4.

the national measure's compatibility with EU internal market law. I see this uncertainty concretized as the amount of "if"-scenarios taking place in the case.

The second significant idea is the use of *market access* test, both with regard to free movement of goods and free movement of capital. As the Court delivered its judgment in *Krantz* long before the *market access* test was introduced, it could not build its reasoning in accordance with it. There is, however, no doubt that the outcome could have been different, had it been given at the current state of EU law. I do not believe that there would have been a breach of Article 34 TFEU even then, though. Nevertheless, in "*Y GmbH v. Finland*", there might be.

As I have pointed out previously, it seems obvious that there was a threshold in *Krantz*, albeit quite implicit, in both AG *Darmon*'s opinion and the Court's judgment, and the circumstances at hand did not meet the threshold. This threshold, which was described as either too remote or too uncertain, corresponds with the *de minimis* thresholds found in the *market access* test. It is the "causality-based" *de minimis* which has been seen in other judgments of the Court as well.

There are two ways to see the threshold. The first is to describe it positively as "*too many if's*" rule. In *Krantz*, the remoteness and uncertainty were brought about by three if-scenarios, which was seen to "cross" the border to the negative side of whether the measure at hand can be a MEE or not. In a way, the level of uncertainty can be seen as the amount of if-scenarios. On the other hand, the threshold could be described negatively as "*the absence of if-scenarios or at least less than three of them*". If this negative threshold is then crossed, the second test of the national measure's connections to the effects comes into question. This option seems more well-founded.

Then again, "*Y GmbH v. Finland*" is a fictional case, albeit it is partly based on *Krantz*. It takes place at the current state of EU law and will thus be seen through the doctrine of *market access* test. The same formula which I have found in *Krantz* – the existence of a causality-based *de minimis* threshold – will be put into test also in this case.

First, let us consider that this case would be settled complying with the same form of reasoning what *Darmon* used in *Krantz*. The first question would then be whether there are "perceptible effects" on imports brought about by the national provision/provisions in question. After this it would be investigated whether the provisions are compatible with the treaty. *Krantz* failed the first test as there were too many uncertainty factors, which was three of them.

Could the number of these uncertainties be fewer than three while still enabling the situation of the national court assessing the recognition and enforcement of the foreign right to actualize? In other words, could there even be a case about recognition of forein proprietary security right without all the mentioned uncertainties? On one hand, it can be argued whether the first "if" scenario, the effect on foreign traders' willingness to enter into an agreement with a Finnish company, really is a hypotheticality in the first place. This is because of the Court's recent case law concerning capital investments. If this uncertainty is treated as a certainty, the number of "if" scenarios is reduced to two. As a consequence, there could, in theory, be grounds for the *Y GmbH*'s claim to succeed and the threshold to be met, depending on the Court's argumentation.

7. CONCLUSIONS: CLARITY TO EXISTING CHAOS OR MERELY A JUMP TO A NEW WAR ZONE?

This thesis has dealt with the issue of what could be the EU law related consequences of a *Statutenwechsel* situation taking place between Germany and Finland with regard to a movable encumbered asset with a German retention of title clause. My focus has been on the free movement provisions concerning goods and capital. While chapter 1 presented the theme and research problems, chapter 2 worked as a theoretical premise focusing on private international law and the national jurisdictions of the two selected Member States. The contribution of this chapter was challenging the criticism that my theme may have encountered in literature, i.e. the outcomes presented in the field of private international law. In addition, it set a more concrete framework for the further thesis. Chapter 3 and 4, which constitute a whole of a kind, namely the first premise of this thesis, went deeper into the European law perspective. First, the literature and barely-there case law of the Court with regard to retention of title clauses and the free movement of goods were explored, then the free movement of capital. Chapter 5 formed part II of the thesis, being a whole as itself: the second premise of this study. Chapters 6 and 7, in turn, work as the conclusion of the logical syllogism presented in the beginning.

As a method, I have invented a fictional case based on a few existing judgments delivered by the ECJ and national courts of Finland and Sweden that have somehow concerned national

treatment of foreign retention of title clauses. Through this case study, I have been able to present a possibility on how the problem of non-recognition and non-enforcement of a retention of title clause originating in another Member State might be resolved by the ECJ.

As a consequence, I have come to the view that the ECJ should clarify its jurisprudence with regard to different manifestations of *de minimis* tests and refrain from presenting contrary interpretations and messages to the audience. The *obvious* interpretation to draw from the existing case law and literature seems to be that a hindrance to the internal trade within the scope of Article 63 TFEU does not seem to exist in relation to my research questions at the present state of the EU. This is because the ECJ has defined the applicable threshold of *market access* test to be on such a high level that in order to reach it, the case cannot fall into any *de minimis* category. Even though some scholars have argued that non-recognition and thus non-enforcement of foreign retention of title clauses – particularly originating in a "liberal" jurisdiction, such as Germany – would constitute an obstacle to internal market, I consider these conclusions quite shortsighted and narrow. Namely, *a mere hindrance to internal market is not sufficient* when the situations are deemed through the *market access* test. This hindrance may indeed be too remote, indirect or hypothetical.

Consequently, I have come up with the following findings. The threshold set for application of Article 34 TFEU *is likely to be met* in a situation similar to my case "*Y GmbH vs. Finland*". However, the facts of the case have been specifically manipulated, even though they are based on real cases – the amount of "if" scenarios or facts has been cut down to two. This means that the likelihood for a case exactly like mine to come before the ECJ is very minimal.

Indeed, if the opinion of AG *Darmon* in *Krantz* is taken as a model, there are a few parameters that can be changed: the amount of uncertainty-factors. There is proof in case *Krantz* that three of these factors is too much for a causal link to actualize between the national measure and its effects on internal market. It can be taken as a fact that three types of *de minimis* tests exist within the jurisprudence of the ECJ at the current state of EU law. Proprietary security rights are prone to fall victim to at least one of these, be it the threshold of too minimal effects, the hypothetical nature of the case or lack of adequate causality between the measure and the effects on trade, the last of which I see as the most significant one. As rules concerning proprietary security rights do not concern trade in the narrow sense of the term, they are usually seen to fall

for the category of "too uncertain and indirect" rule which is one instance of the causality-based *de minimis* threshold. However, this does not mean that these cases could not succeed the test. It merely seems that they would succeed *only if* the uncertainty factors are cut down to minimum. In practice, this would mean that the national provision in question *is meant to govern trade*, one way or another. Furthermore, the effect on trade *should not be merely hypothetical* in a way that it *might* affect potential traders in other Member States.

When it comes to the threshold for the free movement of capital, it is indeed true that the Court has used the *market access* test with regard to capital as well. This makes many of the conclusions made in the field of free movement of goods at least partly applicable here. Moreover, the TFEU Treaty and other official documents do not deny the possibility of proprietary security rights constituting a capital movement and thus an object of Article 63 TFEU. It could even be possible to draw some analogy from the ECJ case law concerning foreign investments. Could the outcome in *KPN and TPG* mean that a case with proprietary security rights would meet the threshold and the national non-recognition and non-enforcement would be seen as *prima facie* prohibited measure that needs to be justified? After all, *Krantz* was given when, first, the current Article 63 TFEU was not directly applicable and second, the *market access* test had not yet been used. If *Roth*'s and *von Wilmowsky*'s arguments of a retention of title constituting a movement of capital are accepted, this case could mean a possible obstacle to the free movement of capital.

Nevertheless, the threshold for infringement for free movement of capital appears not as likely to be met – yet. This is because it cannot be said for certain whether the use of retention of title actually constitutes a movement of *capital*. In a way, everything seems to boil down to how the term "loan" is defined: if it includes the use of reservation of ownership, the door to Article 63 TFEU is open. And this, as a matter of interpretation, is an issue for the ECJ to decide.